ValpoScholar Valparaiso University Law Review

Volume 41
Number 1 *Fall 2006*

*pp.*353-402

Fall 2006

Where Improper Purposes Lead, Inadequate Protections Follow: Integrating the Rule 11 Improper Purpose Inquiry with the Rule Protections for Absent Class Members

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WHERE IMPROPER PURPOSES LEAD, INADEQUATE PROTECTIONS FOLLOW: INTEGRATING THE RULE 11 IMPROPER PURPOSE INQUIRY WITH THE RULE 23 PROTECTIONS FOR ABSENT CLASS MEMBERS

I. INTRODUCTION

The class action is a widely-used litigation device in federal courts today, and its effects upon the American legal system are garnering attention from attorneys, scholars, and legislators alike.[1] As class actions become increasingly prevalent and powerful, a schism has developed between those who support and those who condemn this form of litigation.[2] On one hand, class action opponents assert that class actions are becoming instruments of "predatory litigation" and question the motives of both plaintiff class members and class counsel in bringing the suits.[3] On the other hand, supporters insist that even if certain lawsuits are motivated by a goal other than resolution of the asserted claim, they are not legally improper, and the filer's subjective intent is irrelevant to their legitimacy.[4]

At the core of this debate is Federal Rule of Civil Procedure 11 ("Rule 11") and its requirement that court filings be made without improper purposes.[5] The circuit courts differ in their interpretations of this

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1 *See infra* text accompanying note 19 (introducing generally the uses of the class action litigation device and the reasons for its wide use and continuing popularity); *infra* Part II.C (discussing Congress' recent passage of the Class Action Fairness Act and its concerns expressed in the Act).

2 *See infra* notes 72-75 and accompanying text (demonstrating several reasons given in support of class actions, and discussing the concerns and dangers voiced by opponents of class actions).

3 *See infra* note 61 (discussing the viewpoint expressed by several scholars, the general public, and one federal judge, regarding the inherent problems with allowing non-frivolous but improperly motivated claims to proceed, and examining the Seventh Circuit's approach to the problem); *infra* note 75 (listing several examples of class actions in which purposes such as inflicting negative media attention and economic impairment on the defendant arguably outweigh a sincere and central purpose of vindicating a legal claim).

4 *See infra* notes 42-44 and accompanying text (examining the Second Circuit's approach to Rule 11's improper motive prong, and its refusal to acknowledge it as a consideration independent of Rule 11's requirement of non-frivolousness).

5 FED. R. CIV. P. 11(b)(1) (stating, in pertinent part, that "[b]y presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that . . . it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"). *See infra* note 16

requirement, and this difference in analysis and application of Rule 11 profoundly impacts the protections guaranteed to absent class members through Federal Rule of Civil Procedure 23(a) ("Rule 23" or "Rule 23(a)").[6] Specifically, the way a court approaches Rule 11's improper motive prong dramatically affects the way that court affords to—or strips from—absent class members the protections of Rule 23's typicality and adequate representation requirements.[7]

The preservation of these protections for the absent class members is determinative of whether the absent class members may be constitutionally bound to the outcome of a lawsuit.[8] This Note critically examines the vital role that purpose and motive play in evaluating typicality and adequate representation, and demonstrates that the failure to integrate the Rule 11 motive inquiry with the Rule 23 class certification requirements will result in binding inadequately represented absent class members to the outcome of actions pursued for improper motives.[9] When courts fail to integrate these salient inquiries, the cost of that failure is the constitutional due process rights of the inadequately represented class members.[10]

Part II of this Note examines the development and role of Rule 11 in federal litigation, and discusses various circuit courts' differing interpretations of Rule 11's improper purpose requirement.[11] Part II further examines the typicality and adequate representation requirements of Rule 23(a), and analyzes the overlap between these

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(discussing the development of Rule 11 since its inception in 1938, and providing the text of the current rule); *infra* note 191 (asserting that the amendments to Rule 11 evidence the drafters' intent to preserve the dual-prong structure of Rule 11, demonstrating the importance of evaluating the improper motive prong independently of the non-frivolous prong).

6 *See infra* Part II.B (presenting the Rule 23 class certification requirements of typicality and adequate representation, and explaining the vital importance and inherent overlap of Rule 11's improper motive inquiry with preserving the protections afforded to absent class members through those Rule 23 requirements).

7 *See infra* Part II.B.1 (discussing the Rule 23(a)(3) typicality requirement and the overlap with Rule 11's improper motive inquiry); *infra* Part II.B.2 (examining the Rule 23(a)(4) adequate representation requirement and its interplay with the concerns inherent in the Rule 11 improper motive prong).

8 *See infra* notes 116-18 and accompanying text.

9 *See infra* text accompanying notes 99-101 (examining the overlap between Rule 11's requirement that papers be filed without improper motive and the Rule 23 requirement of typicality); *infra* text accompanying notes 127-30 (examining that overlap relative to the Rule 23 requirement of adequate representation).

10 *See infra* Part III.C.

11 *See infra* Part II.

concerns and Rule 11's improper purpose prong.[12] Next, Part III of this Note analyzes the various approaches to Rule 11's improper purpose prong and explains the effects of each approach on class actions, focusing specifically on the effects on absent class members.[13] Then, Part IV of this Note proposes Model Judicial Reasoning that both resolves the tension between the varying Rule 11 interpretations and ensures greater protection for absent class members as envisioned by Rule 23(a)'s class certification requirements.[14] Finally, Part V of this Note concludes with a look to the future of the class action as a litigation device relative to the proposed Model Judicial Reasoning.[15]

II. BACKGROUND: GETTING LOST ON THE WAY FROM PURPOSE TO PROTECTIONS

Rule 11 states that an attorney or party may be sanctioned for filing papers with an improper motive, even if those papers are non-frivolous.[16] However, the circuit courts do not agree on precisely when

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12 *See infra* Part II.

13 *See infra* Part III.

14 *See infra* Part IV.

15 *See infra* Part V.

16 FED. R. CIV. P. 11(b)(1). The original Rule 11 promulgated in 1938 provided a means of regulating attorney conduct other than the bar's self-regulation through, for instance, the Canons of Professional Ethics. *See* Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty To Report*, 62 OHIO ST. L.J. 1555, 1564-65 (2001). Brown argues that the drafters of the original Rule 11 were concerned with preventing abuse of the litigation process by entrepreneurial attorneys, rather than with deterring or chilling advocacy of novel legal positions or thwarting factually meritless claims. *Id*. at 1562 n.21. The courts were reluctant to use the 1938 version of Rule 11, partly because of the innate hesitation of judges to sanction fellow members of the bar, partly because the sanctions were wholly discretionary, and partly because it was very difficult to prove the subjective bad faith necessary to evidence a Rule 11 violation. Michael J. Mazurczak, *Critical Analysis of Rule 11 Sanctions in the Seventh Circuit*, 72 MARQ. L. REV. 91, 98 (1988); *see also* Brown, *supra*, at 1565-66. In addition to making sanctions mandatory upon finding a violation, the amendments to Rule 11 made in 1983 replaced the subjective bad faith standard for determining a violation of the Rule with objective reasonableness. Brown, *supra*, at 1566-67. The 1983 revision sparked a flurry of satellite litigation, arguably *creating* a larger problem with frivolous claims and inefficient litigation than it solved. *Id*. at 1567-68. The current version of Rule 11 became effective in 1993. *Id*. at 1570. It again made sanctions discretionary, but retained the ultimate goal of deterring certain improper litigation behavior by attorneys and parties. *Id*. at 1571-74. Thus, the current Rule 11 reads, in pertinent part, as follows:

> Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions . . .
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> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is

an improper motive exists such that sanctions are appropriate.[17] This schism is especially apparent when the filed paper in question is an initial claim that appears to be non-frivolous, though possibly prompted by underlying motives other than the resolution of the legal issues presented in the claim.[18] As the class action becomes an increasingly popular litigation device for both resolving legal issues and pursuing "strike suits" intended to pressure large defendants into settlement, negatively impact a defendant's economics, or gain media attention, it becomes imperative that attorneys in both plaintiff and defense bars closely examine how Rule 11's mandates affect which class action lawsuits may properly be filed, and which may lead to sanctions for "improper motives."[19]

Thus, Part II examines the legal foundation and development of Rule 11 and Rule 23, which govern class actions. Part II begins by presenting Rule 11's mandates requiring proper motive in all papers filed in federal courts and explains how varying interpretations of that mandate has resulted in a split among the circuit courts.[20] Part II.A.1 of this section examines the majority interpretation of Rule 11, which rejects the notion that a non-frivolous complaint can be filed with "improper motive."[21] Next, Part II.A.2 explains the minority interpretation of Rule 11, which approves sanctions for filing claims based on an improper motive, even though it presents non-frivolous legal issues.[22] Part II.B then presents the

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> certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
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> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11.

17 *See infra* notes 25-27 and accompanying text.

18 *See infra* notes 31, 41 and accompanying text.

19 *See infra* notes 72-75 and accompanying text.

20 *See infra* Part II.A.

21 *See infra* Part II.A.1.

22 *See infra* Part II.A.2.

basic requirements of class action certification under Rule 23, focusing specifically on the requirements of typicality and adequate representation, and its overlapping concerns with Rule 11.[23] Part II.C concludes with a brief look at the concerns recently professed by Congress regarding class action lawsuits and the motivations behind those suits that may fall well within the ambit of Rule 11's "improper motive" prohibitions.[24]

A. Competing Interpretations of Rule 11: A Fork in the Path Toward Proper Purpose

Despite the text of Rule 11, which forbids filing papers with improper motive and provides no exceptions to that prohibition, some federal circuits have ruled that, especially where the filing in question is an initial complaint, Rule 11 sanctions are appropriate only if the filing is frivolous.[25] On one hand, Rule 11 asserts that sanctions are appropriate where papers are filed with an improper motive and gives no textual credence to the idea that an exception for initial complaints may exist.[26] On the other hand, judges, lawyers, and commentators alike seek to protect the freedom of petition embodied in the First Amendment and they express fear that freedom to petition may be chilled if Rule 11 is asserted too vigorously.[27] These competing concerns have produced competing schools of thought in the federal court system.[28]

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[23] *See infra* Part II.B.

[24] *See infra* Part II.C.

[25] The Ninth Circuit famously held that "a defendant cannot be harassed under Rule 11 because a plaintiff files a complaint against that defendant which complies with the 'well grounded in fact and warranted by existing law' clause of the Rule." Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986). Instead, the court noted that the filing of excessive motions, even if the motions are non-frivolous, may be harassment and sanctionable under Rule 11. *Id.*

[26] *See* Mazurczak, *supra* note 16, at 106 (noting that the improper purpose clause of Rule 11 is a second and distinct prong from the "frivolousness clause" of the Rule). Mazurczak describes the improper purpose portion of Rule 11 as addressing "the problem of misusing judicial procedures as a weapon for personal or economic harassment" and is therefore "not limited to papers filed in bad faith." *Id.* Further, while the 1938 version of Rule 11 noted only "delay" as an improper purpose, the 1983 amendment of Rule 11 added harassment and unnecessary increase in litigation costs as further illustrations of improper purposes, and does not suggest that the provided list of "improper" purposes is exhaustive. *Id.* The 1993 amendment to Rule 11 did not change the improper purpose prong of the Rule. Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727, 727-28 n.2 (2004).

[27] In the dissent to the Seventh Circuit's oft-cited *Szabo Food Services, Inc.* opinion, Circuit Judge Cudahy lamented the majority's decision to sanction a colorable claim for improper purposes because "[d]ue process, unfortunately, is an area where creativity and frivolity sometimes threaten to merge . . . . [T]he chilling effect of today's decision will reach as

1. Majority View: Bypassing the Purpose Prong

Of the federal courts to directly address the question of whether sanctions are appropriate for improperly motivated but non-frivolous claims, a majority of courts hold that sanctions are not appropriate.[29] The Second Circuit, adopting the position advocated by the Ninth Circuit, has explained that a complaint well-grounded in law and fact is inherently brought with a proper purpose.[30] Thus, the Second and Ninth Circuits espouse the idea that a non-frivolous claim cannot, by objective definition, be one motivated by improper purpose.[31]

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tellingly to the most meritorious such claim as to the least." Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1085-86 (7th Cir. 1987). For further discussion of *Szabo*, see *infra* notes 60-61 and accompanying text.

[28] *See In re* Pennie & Edmonds L.L.P, 323 F.3d 86, 90-91 (2d Cir. 2003) (observing that "If the sanction regime is too severe, lawyers will sometimes be deterred from making legitimate submissions on behalf of clients out of apprehension that their conduct will erroneously be deemed improper. On the other hand, if the sanction regime is too lenient, lawyers will sometimes be emboldened to make improper submissions on behalf of clients, confident that their misconduct will either be undetected or dealt with too leniently to matter"); Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988) (describing the challenge before the courts as "constru[ing] the Rule in a manner that will promote the goal of limiting harassment, delay and expense, without impeding zealous advocacy or freezing the common law in the status quo"). *See accord* Jeff Goland, Note, In re Pennie & Edmonds*: The Second Circuit Returns to a Subjective Standard of Bad Faith for Imposing Post-Trial* Sua Sponte *Rule 11 Sanctions*, 78 ST. JOHN'S L. REV. 449, 477 (2004) (explaining the policy behind Rule 11 as a "search for a proper balance between a lawyer's ability to submit all legitimate claims on behalf of clients and the courts' interest in maintaining the functionality and integrity of the legal system").

[29] *See generally* Barbara Comninos Kruzansky, *Sanctions for Non-frivolous Complaints?* Sussman v. Bank of Israel *and Implications for the Improper Purpose Prong of Rule 11*, 61 ALB. L. REV. 1359, 1360 (1998) (observing that of the two "divergent views" professed by the circuits, the majority position reflects the Ninth Circuit's notion that neither party nor attorney should be deterred from bringing a claim even if the purposes behind the claim are not "entirely pure").

[30] Sussman v. Bank of Isr., 56 F.3d 450, 459 (2d Cir. 1995). *See* Kruzansky, *supra* note 29, at 1375 (stating that the Second Circuit by its decision in *Sussman* aligned itself with the "majority camp").

[31] *See, e.g.*, Kruzansky, *supra* note 29, at 1375 (noting that these circuits hold that when a complaint is non-frivolous, improper purpose claims must fail based on the idea that colorable claims embody a proper purpose). However, the courts are not blind to the plain language of Rule 11. The Ninth Circuit Court all but confessed a blatant refusal to follow the language of the Rule:

> The plain language of Rule 11 suggests that the frivolous filings clause and the improper purposes clause are independent; that is, a signer can violate the Rule by filing a frivolous paper even though not done for an improper purpose or, conversely, a signer can violate the Rule by filing a harassing paper even though it is not frivolous on the

The Second Circuit first addressed this issue in *Sussman v. Bank of Israel*.[32] In *Sussman*, the Israeli government, forced to cover depositors' losses via its Bank of Israel, brought suit against several of the officers and directors of North American Bank Ltd. ("NAB"), claiming negligence and breach of fiduciary duties.[33] As the Israeli action against the NAB officers neared its trial date, Nathan Lewin, attorney for two of the defendants located in the United States, informed the Israeli government that his clients wished to bring a counterclaim in the United States.[34] In his letters to the Israeli government, Lewin emphatically urged a settlement discussion, noting the likely and severe damage to Israel's foreign investment market if the American lawsuit was filed.[35]

Undeterred by Lewin's emphatic suggestions of negative publicity and pressure toward settlement, the Israeli government pursued their civil action, prompting Lewin to file suit in New York.[36] Upon the suit's dismissal based on forum non conveniens, the defendants moved for an award of sanctions against Lewin.[37] The defendants claimed the suit was

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> merits. *Despite the language of the Rule*, we have held that the two clauses are not totally independent.

Aetna Life Ins. Co., 855 F.2d at 1475-76 (emphasis added). Moreover, the Ninth Circuit has also acknowledged that its interpretation of Rule 11 is suggested by neither the Rule's text nor structure, and that the Rule provides no basis for treating complaints differently than other filed papers. *In re* Marsch, 36 F.3d 825, 829 (9th Cir. 1994). *Compare* Jeffrey Neal Cole, *Rule 11 Now*, 17 No. 3 LITIGATION 10, 50 (1991) (noting the Ninth Circuit's refusal to interpret either prong of Rule 11 as having a subjective strand running through it), *with* Lancellotti v. Fay, 909 F.2d 15, 19 (1st Cir. 1990) (explaining that Rule 11 contains two separate grounds for sanctions: the "reasonable inquiry" clause and the "improper purpose" clause, and as such, the former is measured by objective standards whereas the latter requires consideration of subjective standards).

[32] 56 F.3d 450, 458-59 (2d Cir. 1995).

[33] *Sussman*, 56 F.3d at 452. The suit and countersuit stemmed from the failure of an Israeli Bank, North American Bank Ltd. ("NAB"), and resultant allegations of fraud, embezzlement, and mismanagement. *Id*.

[34] *Id*. at 453.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 454. The doctrine permits a district court to "decline" jurisdiction, even though all technical venue requirements were met, when allowing the case to proceed in that district would result in severe inconvenience to the litigants and witnesses in the matter. *In re* Dalkon Shield Litig., 581 F. Supp. 135, 139 (D. Md. 1983). The district court called the *Sussman* case a "quintessential case for application of the forum non conveniens doctrine" even while acknowledging that some degree of deference should be given to the forum preferences of Sussman, a United States resident, and the administrators of Guilden's estate, which was being administered in New York. Sussman v. Bank of Isr., 801 F. Supp. 1068, 1074, 1079 (1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) (per curiam). The district court rejected the forum selected by the *Sussman* plaintiffs in favor of Israel based on the forum non conveniens doctrine for a laundry list of reasons. The Second Circuit summarized the district court:

brought for the improper purpose of "forc[ing] the withdrawal of the Israeli action by threatening . . . negative publicity."[38] The district court agreed with the defendants and sanctioned Lewin for $50,000.[39]

However, the Second Circuit overturned the district court's ruling, agreeing with the Ninth Circuit's analysis from *Townsend v. Holman Consulting Corp.*[40] In the *Townsend* opinion, the Ninth Circuit determined that "it would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure. . . . [A] determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue."[41] The Second Circuit quoted the Ninth Circuit's opinion in its *Sussman* analysis, adding that "A party should not be penalized for or deterred from seeking . . . judicial relief merely because one of his multiple purposes in seeking that relief may have been improper."[42]

Further, the Second Circuit has explicitly proclaimed its adherence to an objective standard for Rule 11 review, stating that "there is no necessary subjective component to a proper Rule 11 analysis."[43] The Ninth Circuit similarly explained that "[a]n attorney's subjective intent

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> [A]ll of the claims in the New York complaint would be governed by Israeli law; that Sussman and Guilden had voluntarily elected to invest in Israel; and that parallel litigation arising out of the same alleged conduct was already proceeding [in Israel] . . . [and] the New York conduct "cannot be regarded, in the overall scheme of things, as other than peripheral" to alleged acts and omissions "occurring entirely in Israel."

Sussman, 56 F.3d at 454 (citing *Sussman*, 801 F. Supp. at 1074).

38 *Sussman*, 56 F.3d at 455.

39 *Id.* (noting that the district court imposed sanctions based solely upon "the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint") (quoting Sussman v. Bank of Isr., 154 F.R.D. 68, 69 (S.D.N.Y. 1994)).

40 929 F.2d 1358 (9th Cir. 1990).

41 *Id.* at 1362; *accord* Westlake North Prop. Owners v. Thousand Oaks, 915 F.2d 1301, 1305 (9th Cir. 1990) (reasoning that no non-frivolous papers, even those other than complaints, can violate Rule 11, no matter what subjective reasons may exist for their filing).

42 *Sussman*, 56 F.3d at 459. The Second Circuit also indicated that the purposes behind Lewin's complaint may not be "improper" at all, noting that a filing entered to "exert[ ] pressure on defendants through the generation of adverse and economically disadvantageous publicity" may not be improper so long as it did not lack a foundation in law or fact. *Id.*

43 Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986); *accord* Nat'l Ass'n of Gov't Employees v. Nat'l Fed'n of Fed. Employees, 844 F.2d 216, 224 (5th Cir. 1988) (declaring that subjective bad faith "is no longer an element in Rule 11 inquiries").

in filing is . . . irrelevant to the Rule 11 analysis."[44] The Second and Ninth Circuits are joined in this analysis by the Fifth Circuit, which strictly limits its Rule 11 sanctions for improper purpose to those situations in which clear, objective evidence belies an improper purpose.[45]

For instance, in *Whitehead v. Food Max of Mississippi, Inc.*,[46] the plaintiff sued the Kmart store where she had been abducted from its parking lot and raped.[47] The court entered a judgment against Kmart in the amount of $3.4 million pursuant to the jury's determination that Kmart negligently failed to provide parking lot security.[48] The plaintiff's attorney secured a writ of execution from the court and promptly notified the media of his intent to execute the judgment by seizing cash from Kmart's registers and vaults.[49] Indeed, the attorney, two U.S. Marshals, and reporters, descended upon Kmart as planned, but their attempt to execute the judgment was thwarted when the district court stayed the execution.[50]

On appeal of the stay of execution, the Fifth Circuit found, for the first time in its jurisprudence, that unusual circumstances existed to support sanctioning the attorney's filing that requested the writ of execution.[51] The majority's opinion contrasts with the Second Circuit's *Sussman* opinion, in which the court had determined that economically harmful publicity was not an improper motive.[52] Instead, in *Whitehead*, the Fifth Circuit declared not only that embarrassing Kmart was an

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44 *Westlake North Prop. Owners*, 915 F.2d at 1305. Ninth Circuit jurisprudence is not unanimous on this point and cases exist in which courts appear to consider the improper motive prong of Rule 11 separately from the non-frivolous prong: one district court found an attorney's contentions as factually groundless and unwarranted by existing law, rendering the claim "frivolous" under Rule 11. WSB Elec. Co. v. Rank & File, 103 F.R.D. 417, 420 (N.D. Cal. 1984). However, the court also determined that the claim was interposed for an improper purpose: the pursuit of economic or political objectives. *Id*. at 421. In fact, the court supported its determination with evidence of counsel's choice of litigation tactics, noting that if plaintiffs had actually wanted the relief they purported to seek, they would have sought injunctive relief from the state court instead of "cho[osing] instead to commence complex and burdensome litigation" in the federal court system. *Id*. at 420.

45 *Nat'l Ass'n of Gov't Employees*, 844 F.2d at 224.

46 332 F.3d 796 (5th Cir. 2003).

47 *Id.* at 799. The rape did not take place at the Kmart store; however, the abduction that led to the rape occurred in the store's parking lot. *Id*.

48 *Id*.

49 *Id*. at 800.

50 *Id*.

51 *Id*. at 808 (describing the sanctioned attorney's conduct as "exceptional").

52 *Id.* at 808-09; *see supra* note 42 and accompanying text.

improper motive, but that it actually far outweighed any legitimate motive that might possibly exist.[53] As discussed by Judge Carolyn Dineen King in her dissent, the Fifth Circuit uses an "unusual or exceptional circumstances" analysis in determining whether sanctions for improper purpose are appropriate.[54] Judge King noted that until the decision at hand, the Fifth Circuit "ha[d] not found a case with such 'unusual circumstances' to merit upholding an 'improper purpose' finding" where the filing in question was non-frivolous.[55] Judge King specifically criticized the Fifth Circuit majority for failing to give proper weight to the possible legitimate purposes behind the attorney's filing.[56]

Thus, *Whitehead* functions as the exception proving the rule: except for the *Whitehead* court's rarely invoked "unusual or exceptional circumstances" test, courts following the majority view refuse to acknowledge improper motive sufficient to violate Rule 11 so long as the underlying claim is minimally colorable.[57] Courts adhering to the minority view, however, weigh the improper motive prong of Rule 11 as a separate consideration, distinct and independent from the Rule 11 requirement that the claim be non-frivolous.[58]

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53 *Whitehead*, 332 F.3d at 808–09. It is interesting to contrast this decision with the Second Circuit's discussion in *Sussman*. *See supra* note 42 and accompanying text. If the *Sussman* court reviewed the *Whitehead* case, Judge King's dissent arguably could carry the day based on the *Sussman* court's assertion that the generation of adverse and economically harmful publicity is not an improper motive. *Sussman*, 56 F.3d at 459. This illustrates a sub-split within the circuit split and the difficulty courts face when deciding Rule 11 cases: where the Fifth Circuit sees "mixed purposes" with improper purposes outweighing the proper purposes, the Second Circuit sees no improper purpose at all.

54 *Whitehead*, 332 F.3d at 813 (King, J., dissenting).

55 *Id*.

56 *Id*. at 814 (calling the sanctioned attorney's tactics "colorful" but advocating greater tolerance for arguably-borderline litigation strategies, especially in debt-collection situations where such tactics may be more common). In fact, a divided panel of the Fifth Circuit had previously reversed the imposition of sanctions, holding that although the attorney's intent to publicly embarrass Kmart was improper, he had a legitimate purpose in attempting to execute a valid judgment. Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 796-97 (5th Cir. 2002). The panel used the same "exceptional circumstances" test that the Fifth Circuit court, en banc, used when it affirmed the imposition of the sanctions. *Id.* at 796. The panel's refusal to affirm the sanctions comported with Fifth Circuit jurisprudence, in which an attorney's mixed purposes behind a filing—some legitimate, some improper—had never been held sufficiently unusual or exceptional to justify sanctions. *Whitehead*, 332 F.3d at 813 (King, J., dissenting).

57 *See supra* notes 29-31 and accompanying text.

58 *See, e.g.*, *infra* note 61.

2. Minority View: Forging a Path Toward Proper Purpose

The Seventh Circuit has consistently held that courts can, and should, impose sanctions when a complaint is filed for an improper motive, even if that complaint is non-frivolous.[59] In its oft-quoted and frequently analyzed case, *Szabo Food Service, Inc. v. Canteen Corp.*, the Seventh Circuit explained its perspective regarding Rule 11 challenges:

> Much of [the plaintiff's] brief in this court is devoted to a demonstration that it had an objectively sufficient basis for its claim of racial discrimination. Perhaps it can persuade the district court that it did, *but this is not enough*. Because Rule 11 has a subjective component as well, the district court must find out why [the plaintiff] pursued this litigation. The Rule effectively picks up the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning).[60]

Thus, the Seventh Circuit unambiguously established its position with the minority of the circuits by forthrightly declaring that an objectively non-frivolous claim is insufficient to shield a filer from sanctions, and instructing courts to evaluate subjectively why litigants and attorneys bring their complaints.[61]

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[59] Kruzansky, *supra* note 29, at 1382 (observing that of the circuit courts that have directly addressed courts' ability to sanction the filing of non-frivolous complaints brought for an improper purpose, only the Seventh Circuit has "ruled repeatedly . . . that a court may freely impose sanctions under such circumstances").

[60] 823 F.2d 1073, 1083 (7th Cir. 1987) (emphasis added).

[61] The *Szabo* court borrowed the accusation of "predatory litigation" from the arena of antitrust litigation, and stated that "[p]erhaps [those arguments] have substance here too." *Id*. at 1082-83. The Seventh Circuit has consistently held that Rule 11 embodies both a subjective and objective component, and the subjective component requires a court to investigate why a litigant pursued the litigation. *See, e.g.*, Gottlieb v. Westin Hotel Co., 990 F.2d 323, 329 (7th Cir. 1993); Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928, 932 (7th Cir. 1989); *Szabo*, 823 F.2d at 1083; *In re* TCI Ltd., 769 F.2d 441, 445 (7th Cir. 1985). The Seventh Circuit's position may actually closely comport with the changes to the legal system deemed necessary by the public. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 92, 107 (1994) (asserting that as officers of the court, lawyers should temper their zeal for representing their clients with their professional responsibility dictated by the "rules of law and principles of professional ethics," but noting that popular dissatisfaction still occurs because some cases "are pursued and presented because they are deemed to have vexation value"). Re also observes that "The public perceives that lawyers file every conceivable type of case, regardless of merit.

Likewise, in *Kapco Manufacturing Co. v. C & O Enterprises, Inc.*,[62] the Seventh Circuit reaffirmed its position that Rule 11 "forbids the filing of pleadings that are interposed for any improper purpose, such as to harass or . . . needless[ly] increase[ ] cost of litigation."[63] The Seventh Circuit sharply answered the plaintiff attorney's suggestion that calling litigation a "civilized bloodless war between the parties" was "merely stat[ing] the obvious; it does not provide a showing that [the plaintiff] has asserted frivolous and baseless claims."[64] The court held that, contrary to plaintiff counsel's assertion, a district court is not required to find plaintiff's claims frivolous or baseless in order to justify the imposition of Rule 11 sanctions.[65]

Courts in the Fourth Circuit closely align with the Seventh Circuit's jurisprudence, though the Seventh Circuit remains the most stalwart and consistent of the minority circuits in its application of Rule 11.[66] In the

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As a result, the quality of cases filed with the courts has burdened court dockets and threatens the quality of justice." *Id*. *See also* Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1570 (1996) (declaring that "[f]rivolous lawsuits waste limited judicial resources and clog the courts' dockets, preventing or delaying access to justice to other plaintiffs with meritorious claims"). *Accord* Kevin Thomas Duffy, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?, The Actual Operation of Amended Rule 11*, 54 FORDHAM L. REV. 20, 20 (1985). Duffy presents a federal judge's perspective on the dissatisfaction surrounding lawyers' filings of frivolous or improper suits and arguing for stricter self-regulation rather than strong reliance on the judiciary to thwart the problem:

> Why do lawyers bring stupid, senseless, baseless lawsuits? Because they get away with it. The organized bar itself is supposed to watch out for the activities of lawyers. Has the organized bar met its own requirements? Are lawyers still bringing stupid, senseless, baseless lawsuits? Sure. Why aren't they disbarred? Well, they are not, and it is quite obvious to the judiciary that if the organized bar is not going to clean its own house then somebody has got to do something about it. Isn't it nice of the organized bar to say, "Hey we have got a problem, let's pass it off to the judiciary."

Id.

62 886 F.2d 1485 (7th Cir. 1989).

63 *Id*. at 1491 (citing Brown v. Fed'n of State Med. Bds., 830 F.2d 1429, 1434 (7th Cir. 1987)).

64 *Id*. at 1493.

65 It is interesting to note, however, that the district court found the plaintiff's claims frivolous and baseless, but the Seventh Circuit clearly indicates that the imposition of sanctions was warranted, notwithstanding that finding. *Id*.

66 *See supra* note 59 and accompanying text. The Fourth Circuit takes a more compromising view of Rule 11's two separate prongs than does the Seventh Circuit, as the Fourth Circuit advocates first examining whether a pleading is well-grounded in law and fact, declaring that "will often influence the determination of the signer's purpose." *In re* Kunstler, 914 F.2d 505, 518 (4th Cir. 1990). Thus, the Fourth Circuit subtly blurs the line between the two prongs of Rule 11, allowing the weight of one prong to affect the weight given to the other. *Id*. This is not to suggest, however, that the Fourth Circuit is not still in

much-cited *In re Kunstler* ruling, the Fourth Circuit declined to rule definitively on the issue, stating that the complaint at issue lacked basis in law or fact and that the court "need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was filed for an improper purpose."[67] The Fourth Circuit went on to explain that:

> If a complaint is not filed to vindicate rights in court, its purpose must be improper. However, if a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere.[68]

Thus, even though the court expressly refused to rule on the issue, it took the opportunity to indicate, in dicta, that it was holding open the possibility for the imposition of Rule 11 sanctions in a non-frivolous claim based on the improper purpose prong.[69]

Later decisions from lower courts in the Fourth Circuit support the *Kunstler* court's dicta. The District Court for the Eastern District of North Carolina stated that even a pleading well-grounded in law or fact can violate Rule 11 if it is filed for an improper purpose.[70] The court further explained that Rule 11 "has a subjective component as well," and that sanctions are appropriately imposed where "one of the main reasons [for filing suit] was to harass [the defendant], an improper purpose under Rule 11."[71] Thus, while each circuit that has addressed the issue notes its

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agreement with the Seventh Circuit on the point of whether or not to sanction a non-frivolous claim when it is filed for an improper purpose. *See, e.g.*, Cohen v. Va. Elec. & Power Co., 788 F.2d 247, 249 (4th Cir. 1986) (determining that plaintiff had a sanctionable improper purpose where plaintiff planned to withdraw a factually and legally supportable motion if the opposing party resisted); Ballentine v. Taco Bell Corp., 135 F.R.D. 117, 122 (E.D.N.C. 1991) (concluding that "Rule 11 has a subjective component as well [and] [s]ubjective bad faith may be considered when the suit is objectively colorable").

67 914 F.2d at 518.

68 *Id*.

69 *Id*.

70 *Ballentine*, 135 F.R.D. at 125.

71 *Id*. at 124-25 ("The correct focus is upon the improper purpose of the signer, and such purpose must be determined from the motive of the signer in pursuing the suit. The subjective beliefs of the injured party are not relevant, and the Court must look at more

importance and the disparate interpretations of the Rule, no uniform interpretation of the improper motive prong has been established or adopted. While this is a troubling enough problem in individual litigation, it is exceptionally alarming as applied to federal class actions.

B. Class Action Certification Requirements Under Rule 23(a): Setting the Compass to "Adequate Protections"

Concerns regarding improper motives underlying the filing of claims are perhaps nowhere more acute than in the realm of class actions.[72] Class actions often provide the potential for large fee payouts for the class's attorney, as well as negative media attention and economically harmful litigation for the defendant.[73] The class action litigation device not only provides plaintiffs a means for bringing otherwise economically unfeasible claims, but also provides incentives for attorneys that may well be deemed "improper," as there may be personal and economic motives for acquiring the large fees common in class actions.[74]

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objective evidence of the signer's purpose. This does require consideration of the signer's subjective belief.") (internal citations omitted).

[72] *See, e.g.,* Michelle Connell, Comment, *Full Faith and Credit Clause: A Defense to Nationwide Class Action Certification?*, 53 CASE W. RES. L. REV. 1041, 1041, 1055 (2003) (explaining that the original policy reasons behind the class action litigation device, including judicial efficiency and avoidance of duplicative litigation, are "lost" as the viability of plaintiffs' arguably harassing claims increases, and the attorneys' fees increase as well); *see also* Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's* The Barrister and The Bomb, 69 B.U. L. REV. 649, 650 (1989) (noting increases in the number of cases in which a class of plaintiffs stand to win only small recoveries, but the attorneys stand to gain large fees). Weinstein also observes the possibility of "small litigants" guided by "sharply aggressive plaintiff's counsel" using tactics including harassing discovery requests to force a "big" defendant into settlement. *Id*.

[73] *See* Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 736 (1998) (accusing attorneys of "sell[ing] out the public's interest" in mass tort litigation suits to the lawyers for high attorney fees). Gordon also calls for reforms in the civil justice system to halt the "pollution" of the system by its attorneys through their evasion of and maneuvering around those rules—and Gordon uses Rule 11 as an example—that would keep in check such ethical dilemmas as pursuing claims for high attorney fees more so than (or instead of) pursuing them for the public's or client's interest. *Id*. at 736-37. *See also* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM U. L. REV. 1573, 1615 (1997) (calling for national tort reform to protect defendants from "undeserved and excessive" monetary judgments against them). Pace asserts that instead of being a legitimate tool for social reform, excessive awards are being demanded too often, making "[m]ultimillion dollar punitive awards . . . the rule rather than the exception" and thereby threatening "the stability of American industry." *Id*. at 1638 n.220.

[74] *See* Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 104-05 (1994). Bone contends that mass tort cases and "small claimant" class action

Arguably improper motives may affect the plaintiffs as well, as some claimants may utilize the class action device not to seek resolution of their legal issue, but to inflict negative media attention and economic impairment upon the defendant.[75] The class action device does not include any specific or explicit consideration of the motives of plaintiffs or attorneys.[76] However, the factors a court must consider before certifying a class are not independent of motive considerations,

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suits share a danger in the attorneys' motivation for high fees. *Id*. Bone even notes that the attorney's motivation for high fees can essentially pollute the class representative plaintiff's motivation for the suit or the settlement:

> Attorneys tend to control the litigation without much oversight by clients. This feature encourages wasteful strategic maneuvering as each lawyer jockeys for a position in the litigation that will assure her a maximum fee. Even when the class representative actually monitors class counsel, there is a risk that the class attorney and the class representative will collude with the defendant to reach a settlement that treats the lawyer and representative more favorably than absentees.

Id. *Accord* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546 (2004) (showing attorneys' fees as percentages of overall class recovery in class action settlements from 1993-2003, and noting the mean percentage of the recovery going to the attorneys as 26.4%, and the median being 25.0%).

[75] Pace, *supra* note 73, at 1638; *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (expressing concern about plaintiffs who use class action lawsuits as a means of extracting "blackmail settlements" from defendants); Richard H. Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787, 817-18 (1983) (noting that the class action device has been described as "legalized blackmail" and that class actions may be used as "leverage for coercing unmerited settlements"). National news publications also take cynical shots at class action lawsuits that ring insincere, despite plaintiff's insistence to the contrary. *See, e.g.*, Shannon Brownlee, *Portion Distortion: You Don't Know the Half of It*, WASH. POST, Dec. 29, 2002, at B5 (describing with incredulity a class action filed against McDonald's by a mother who insisted that she "believed McDonald's food was healthy for [her] son"). In fact, the national news media may actually help create a plaintiff class where none previously existed, thus casting doubt upon the integrity of the suit by calling into question which came first: the plaintiff's injury, thereby necessitating a defendant from whom to recover damages, or the plaintiff's awareness of damages to be recovered from a defendant, thereby necessitating an injury? *See, e.g.*, *In re* Orthopedic Bone Screw Prods. Liab. Litig., 176 F.R.D. 158, 165 (E.D. Pa. 1997) (noting that plaintiffs started pursuing claims against the defendant following a television news story on *20/20* examining the screws used during spinal fusion surgery); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1021 (1993) (asserting that an article in the *National Enquirer* spurred a class action focusing on a medication (Bendectin), and that a story from the television show *60 Minutes* prompted litigation regarding an intrauterine contraceptive device (Dalkon Shield)).

[76] *See infra* note 78; *see generally* FED. R. CIV. P. 23. However, the federal rule leaves open the door to such inquiries into an attorney's motives. *See* FED. R. CIV. P. 23(g)(1)(C)(ii) (instructing the court to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class").

especially the prongs of Rule 23(a) which require a determination of typicality and adequate representation.[77]

Before considering how Rule 11 considerations should affect a judge's evaluation of class certification, especially the factors of typicality and adequate representation, it is helpful to first review the structure and function of class actions established by Rule 23(a).[78] Ideally, class actions "promot[e] judicial economy through the efficient resolution of multiple claims in one case, and . . . provide an opportunity for persons with small claims to assert their rights."[79] Plaintiffs petitioning a court for class certification must identify the class members; that is, plaintiffs must "define" the class.[80] The court then must ascertain whether the

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77 *See infra* Parts II.C.1-2.

78 FED. R. CIV. P. 23(a) states, in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

79 L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using* Daubert *To Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1044 (2004). Regarding judicial economy, see Califano v. Yamasaki, 442 U.S. 682, 701 (1979), in which the Court noted that as long as membership in the class is properly limited, class treatment of certain suits "is consistent with the need for case-by-case adjudication." However, courts have also noted that because of the tangible and powerful impact plaintiff class actions may have on defendants, courts must exercise cautious review of class actions brought. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-40 (1975) (stating relative to securities lawsuits that "There has been widespread recognition that [class action litigation] presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. . . . We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs . . . is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them").

80 The putative class must be "precise, objective, and presently ascertainable" such that the court is able to determine who is included in the class and who is therefore entitled to relief and bound by the judgment. Rozema v. Marshfield Clinic, 174 F.R.D. 425, 431 (D. Wis. 1997); Zapata v. IBP, Inc., 167 F.R.D. 147, 156 (D. Kan. 1996). Thus, "[d]efinitions, particularly under [Rule 23](b)(3), should avoid criteria that are subjective (e.g., a plaintiff's state of mind) or that depend on the merits (e.g., persons who were discriminated against)." *Rozema*, 174 F.R.D. at 431 (internal quotations and citations omitted); *see also* Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (holding that a class whose definition depended upon each class member's state of mind was not sufficiently definite). While definition of the class is an "essential prerequisite," the class definition must be only as precise as necessary to make it "administratively feasible" for a court to determine whether a particular individual is a member of the class. Stewart v. Assocs. Consumer Disc. Co., 183 F.R.D. 189, 198 (D. Pa. 1998); Sharp v. Hilleary Franchise Sys., Inc., 56 F.R.D. 34, 36 (E.D.

putative class members meet the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequate representation.[81]

Of these four requirements, typicality and adequate representation are most pertinent to the Rule 11 inquiry.[82] The typicality prong requires scrutiny of the incentives of a putative class representative to ensure that those incentives are closely enough aligned with the incentives of all class members to make the putative representative a proper advocate for all the class members' interests in the suit.[83] Thus, the concerns of Rule 11 and typicality overlap because both require a court to consider the motives, and the incentives underlying those motives, of class representatives.

The adequate representation prong requires a court to determine whether the putative class representatives and the putative class counsel will sufficiently and zealously present the interests of all the class members.[84] The Rule 11 concerns of improper motive overlap with this

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Mo. 1972). Case law makes clear the notion that class definitions must be precise and objective so as to make it administratively feasible to determine which individuals are class members and which are not. *Stewart*, 183 F.R.D. at 198; *Zapata*, 167 F.R.D. at 156. However, it is vital to note that the notion of "objectiveness" and rejecting class definitions based on "state of mind" refer to the putative plaintiff's state of mind and subjective opinion as it relates to the injury purportedly suffered. *See, e.g.*, *Simer*, 661 F.2d at 669. This is an entirely different inquiry than the subjective purpose behind filing and pursuing a particular claim, as the former inquiry focuses on an injury as defined by a state of mind, whereas the latter inquiry focuses on why a litigant brings the claim, regardless of what injury is asserted.

[81] *See supra* note 78. Indeed, courts are required to evaluate the presence of each of Rule 23(a)'s requirements before certifying a class; it is insufficient for a motion for certification to merely recite the language of Rule 23 without providing basic facts indicating that each requirement under the Rule is actually fulfilled. Weathers v. Peters Realty Corp., 449 F.2d 1197, 1200 (6th Cir. 1974). The party seeking class certification bears the burden of proving to the court that each of Rule 23's requirements are met. *See, e.g.*, Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 56 (D. Iowa 1974); Green v. Cauthen, 379 F. Supp. 361, 371 (D.S.C. 1974); Howard N. Gorney, *The Importance of Good Faith in Fraudulent Transfer Analysis*, AM. BANKR. INST. J., Mar. 2003, at 51 (noting that proving the affirmative existence of any element of a lawsuit is far easier than attempting to demonstrate the absence of a fact or element).

[82] *See infra* notes 83-85, and accompanying text.

[83] *See generally* Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982); Taliaferro v. State Council of Higher Educ., 372 F. Supp. 1378, 1387 (E.D. Va. 1974).

[84] *See generally* Hansberry v. Lee, 311 U.S. 32 (1940). Prior to the 2003 amendments to Rule 23, the adequacy of class counsel was evaluated only under the adequate representation prong. FED. R. CIV. P. 23(a)(4). However, the amendments effected on December 1, 2003, created subsection (g), which provides courts with guidelines for examining the class counsel's qualifications independently from the adequacy of the named representative. FED. R. CIV. P. 23(g). The Advisory Committee explained that the amendment

determination, as class representatives or class counsel with motives that differ from those of the absent class members may not be, by definition, adequate representatives of those absent class members' interests.[85]

1. Typicality

Typicality requires, as its name suggests, that the claims of the named plaintiffs be typical of the claims of the class.[86] The typicality prong requires that a court examine whether the issue in dispute occupies the same degree of importance and centrality to the named plaintiffs' claim as that issue would occupy for all other class members' claims.[87] Moreover, the named representatives' interests should coincide with the interests of the "absent class members," that is, all the other parties encompassed by the class definition but not actively involved in the litigation as named representatives.[88] Because the named representative is asserting claims and purportedly seeking vindication of certain rights on behalf of a class, typicality requires the judge to

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> responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel.

FED. R. CIV. P. 23(g) advisory comm.'s note.

85 *See infra* notes 103-04 and accompanying text.

86 FED. R. CIV. P. 23(a)(3).

87 *See, e.g.*, *Falcon*, 457 U.S. at 147; *Taliaferro*, 372 F. Supp. at 1387 (noting that the typicality requirement affords protection to class members against unwarranted or unnecessary involvement of their legal rights by representatives whose stake in the proceeding is dissimilar).

88 The typicality requirement must guarantee that the interests asserted by the named representative are coextensive with those of the class members in order to ensure that no class member's claim (nor significant aspects of any member's claim) will be unrepresented or underrepresented by the named plaintiffs. Kaminski v. Shawmut Credit Union, 416 F. Supp. 1119, 1123 (D. Mass. 1976); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581, 587 (D. Pa. 1975).

evaluate whether the representatives' claims and interests are properly aligned with those of the absent class members.[89]

The main purpose of typicality, despite factual variations in the representatives' and absent class members' claims, is to ensure that the named plaintiffs act on behalf of and safeguard the interests of the class.[90] Typicality calls for the class representatives to have suffered injury in the same general fashion as the absent class members so that the legal arguments and assertions presented by the named representatives will fairly and vigorously encompass those likely to be made by the absent class members.[91] Thus, Rule 23's typicality requirement supports the adequate representation requirement as well because when the named representatives' claims are typical of the class, they will have great incentive to support their claims and will advance the claims of the class members.[92]

For example, in *General Telephone Company of the Southwest v. Falcon*,[93] the named plaintiff class representative alleged disparate treatment, claiming that he did not receive a promotion at the defendant corporation because he was Mexican-American.[94] Named plaintiff Falcon sought to represent all Mexican-Americans who had been or might have been adversely affected by the defendant's alleged discriminatory practices.[95] The Supreme Court held that the district court erred when it presumed that named plaintiff Falcon's claim was typical of the class he sought to represent.[96] The Court explained that even when the named plaintiff alleges racial discrimination, which the Court referred to as "by definition class discrimination," typicality

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89 Thus, pursuant to this prerequisite to class certification, the interests of the named plaintiff cannot be antagonistic to or in conflict with the interests of the putative class. Gates v. Dalton, 67 F.R.D. 621, 630 (E.D.N.Y. 1975). However, typicality is not negated simply because some factual variations exist between the named plaintiffs' claims and those of the absent class members. Bynum v. District of Columbia, 214 F.R.D. 27, 34 (D.D.C. 2003).

90 Littlewolf v. Hodel, 681 F. Supp. 929, 935 (D.D.C. 1988).

91 *Bynum*, 214 F.R.D. at 34; Thomas v. Christopher, 169 F.R.D. 224, 238 (D.D.C. 1996).

92 *See infra*, Part II.B.2; *see also* Rosado v. Wyman, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970).

93 457 U.S. 147 (1982).

94 *Id*. at 149.

95 *Id*. at 150-51. *Falcon* described the putative class as "'composed of Mexican-American persons who are employed, or who might be employed, by GENERAL TELEPHONE COMPANY at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein.'" *Id*. at 151.

96 *Id*. at 158.

cannot be presumed or inferred.[97] In order to demonstrate that Falcon's claim was sufficiently "typical" of the class he sought to represent, the Court stated that he must prove, *inter alia*, that the discrimination he alleged was typical of the defendant's promotion practices, and that the defendant's other employment practices (such as hiring) also involved the alleged policy of discrimination in the same way it was involved in the promotion practices.[98]

Thus, Rule 11's requirement of filing papers without improper motive overlaps with Rule 23's requirement of typicality because a putative class representative whose motives were improper—that is, whose driving interest in the case was something other than the legal issues presented on the face of the claim—would not fairly and vigorously encompass the interests of the absent class members whose motives would be proper.[99] Where a putative class representative is motivated by interests other than those expressed by the claim's legal issues, that party cannot be expected to simultaneously safeguard the interests of all absent class members for whom the legal issues themselves are the primary motivation because the putative representative's interests would not properly "coincide" with the absent class members' interests.[100] Moreover, the putative representative who files a claim motivated by interests other than the legal claims at stake could not accurately be described as holding the legal issues to the same degree of importance and centrality as those absent class members motivated solely by the resolution of those legal issues.[101]

2. Adequate Representation

In addition to typicality, a putative class representative must demonstrate adequate representation.[102] The party or parties named as

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97 *Id.* at 157. In fact, the burden of proof for all of Rule 23(a)'s prerequisites is on the plaintiff, and the class action device under Rule 23 may not be used unless and until the plaintiff meets the burden for each prerequisite. Thompson v. T. F. I. Cos., 64 F.R.D. 140, 148 (D. Ill. 1974).

98 *Id.* at 158.

99 *See supra* text accompanying note 91.

100 *See supra* note 88.

101 *See supra* note 87.

102 Hansberry v. Lee, 311 U.S. 32, 44-46 (1940) (holding that no class member can be bound to a judgment in which that person was not adequately represented); *see also* Laskey v. Int'l Union, 638 F.2d 954, 956 (6th Cir. 1981) (explaining that "[a] judgment in a class action binds the class where the class [has] been adequately represented or where they actually participated in the litigation. An absent member will not be bound if he proves the procedure did not adequately insure the protection of his interests"); *accord* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 721 (2005)

representatives for the class must have virtually the same interest in the litigation as all the absent class members who will be bound by the litigation.[103] The class representatives should so closely align with the absent class members' interests in the litigation that the representatives "may be depended upon to bring forward the entire merits of the controversy as protection to their own interests."[104] Indeed, adequate representation is the touchstone of due process in class action cases, providing the constitutional equivalent of the absent class members' "day in court."[105]

The seminal case of *Hansberry v. Lee*[106] focused on an agreement restricting the use of land in a Chicago neighborhood, which dictated that no part of the land in that neighborhood could be "sold, leased to or

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(describing the tension inherent in the use of preclusion as applied to members of a class, and the doctrine of preclusion as it developed through its use in individual litigation, stemming from the multiplicity of interests represented in a class action). Wolff asserts:

> There is a deep tension between the doctrine of preclusion as it is frequently applied in individual litigation and the conditions that serve to limit the use of the class action device. When absent class members are bound to a judgment, they are bound by virtue of the commonality of interest that makes it possible to find individual plaintiffs who will serve as proper representatives for them all. *A court's evaluation of factors like adequacy of representation, typicality, and superiority requires it to compare the respective interests and incentives of all the members of the class*. When a court conducts such an evaluation, it must do so not only with respect to the likely course of the litigation currently before it, but also with respect to the likely future impact of a judgment upon the interests of class members. In other words, a court must assess, early in the proceedings, what the likely preclusive effect of a judgment will be upon members of the class it has been asked to certify.

Id. at 721-22 (emphasis added).

[103] *See* 47 AM. JUR. 2D *Judgments* § 671 (2005); Underwood, *supra* note 75. The idea of adequate class representation must be more than a "convenient fiction." Underwood, *supra* note 75, at 788-89. *But see* Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963, 981 (5th Cir. 1996) (examining the possible intraclass interest conflicts between those plaintiffs who were currently exhibiting asbestos-related injuries and thus requiring monetary settlements right away, and those plaintiffs whose asbestos-related injuries were not yet observable and may not create symptoms for many years, thus rendering an incentive for some delay in disbursing the monetary damages). The *Flangan* court did not attempt to resolve the intraclass interest conflicts, but rather determined that they were simply "outweighed" by the groups' common interest in a Global Settlement Agreement. *Id*.

[104] AM. JUR. 2D *Judgments, supra* note 103, § 671; *see also* Rittenoure v. Edinburg, 159 F.2d 989, 992-93 (5th Cir. 1947) ("The principles of class representation whereby absent persons may be bound by judgments contemplate a real presentation of the issues to the court by parties whose interests are identical with those of the absent persons, and a decision of them by [a] court.").

[105] *Hansberry*, 311 U.S. at 45-46.

[106] *Id*.

permitted to be occupied by any person of the colored race."[107] The Hansberry family acquired land in that neighborhood and, as African-Americans, challenged the validity of the restrictive covenant on the grounds that the requisite percentage of landowners had not signed the agreement.[108] In an earlier case, referred to by the Court as the *Burke* case, a landowner brought suit to enforce the same restrictive agreement that would later be challenged in *Hansberry*.[109] In the *Burke* case, the parties stipulated that the required percentage of landowners had signed the agreement, rendering the agreement valid.[110] However, the circuit court found in Hansberry's action that only 54% of landowners signed the agreement, and that the stipulation from the *Burke* case was false and fraudulent.[111] Nonetheless, the circuit court held that Hansberry was bound through res judicata to the earlier agreement, which bound all landowners in that Chicago neighborhood as class members in *Burke*.[112]

The *Hansberry* situation prompted the Supreme Court to declare that no party can be joined to a class judgment merely because that party superficially fits the description of the purported class to be bound.[113] Hansberry was a landowner in that neighborhood, and by that description, within the class of persons allegedly bound by the *Burke* case.[114] However, the Court noted that while the plaintiffs in the *Burke* case sought to *enforce* the restrictive agreement, the plaintiffs in the

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107 *Id*. at 37-38.

108 *Id*. The Hansberrys, as petitioners, challenged the restrictive agreement on the grounds that it never became valid because it was not signed by the requisite 95% of the frontage landowners. *Id*.

109 *See* Burke v. Kleinman, 277 Ill. App. 519 (1934).

110 *Hansberry*, 311 U.S. at 38.

111 *Id*.

112 *Id*. A claim may be barred by a judgment in an earlier suit through the doctrine of res judicata. *See* AM. JUR. 2D *Judgments, supra* note 103, § 514. In order to bar a claim through this doctrine, the party seeking to bar the claim must demonstrate that the prior case has come to a judgment that is final, valid, and decided on the merits of the case (as opposed to being dismissed for some procedural deficiency). *Id*. Further, the parties in the later suit must either be the same as the parties from the first suit, or must be in privity with, a successor in interest to, or adequately represented by, the parties from the first suit. *Id*. Finally, the claim to be barred must be within the scope of those claims adjudged in the first suit; that is, the claim to be barred must stem from the same transaction or set of transactions as the first claim. *Id*. *See also* Johnson Co. v. Wharton, 152 U.S. 252 (1893); Popp v. Hardy, 508 N.E.2d 1282, 1286 (Ind. Ct. App. 1987) ("Before res judicata operates to bar a subsequent action, it must be shown: (1) that the former court had jurisdiction; (2) that the matter now in issue was or might have been determined in the prior suit; (3) that the former controversy was between the same parties or their privies; and (4) that the prior judgment was entered on the merits.").

113 *Hansberry*, 311 U.S. at 44-46.

114 *Id*. at 38.

Hansberry case sought to prove its invalidity, rendering the *Hansberry* plaintiffs' interests in direct opposition to the interests asserted in the *Burke* case.[115] The Court held that it is a violation of the absent class members' due process rights to bind them to a judgment in which the substantial interest of their purported representatives "are not necessarily or even probably the same as those whom they are deemed to represent."[116] Thus, the federal Constitution forbids the foreclosure of absent class members' rights absent adequate representation.[117]

Moreover, adequacy of representation is vitally important because class actions brought under Rule 23 may result in binding judgments upon class members who never had any actual knowledge of the suit, and whose due process rights depend entirely upon the representatives certified by the court.[118] Because of the high stakes in class actions, including the binding effect on absent class members and their constitutional concerns, the adequacy requirement is generally strictly construed, carefully scrutinized, and stringently applied.[119] Courts must consider the putative class representative while keeping in mind that the "fair representation cannot be inferred merely from vigorous

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[115] *Id*. at 45-46 (reasoning that "[t]he plaintiffs in the Burke Case sought to compel performance of the agreement in behalf of themselves and all others similarly situated. . . . In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance").

[116] *Id*. ("For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge."). The Court also noted that allowing parties whose interests were not the same as the absent class members to be representatives of the class would afford opportunities for "fraudulent and collusive sacrifice of the rights of absent parties." *Id*. at 45. *See also* Underwood, *supra* note 75, at 788-89 (listing a variety of requirements courts had given for putative class representatives to be deemed adequate, including having a keen interest in the progress and outcome of the litigation, having some knowledge of the class claims and class action procedures, being in sufficiently good health to vigorously prosecute the action, being a reliable witness, being able and willing to bear the costs of the litigation, and not insisting on more than a pro rata share of any recovery).

[117] *Hansberry*, 311 U.S. at 44-46.

[118] Du Pont v. Wyly, 61 F.R.D. 615, 621 (D. Del. 1973). Indeed, the representatives must be expected to "put up a real fight" on behalf of themselves or their named clients, as well the absent class members. *Id*. (internal citations omitted). *See generally* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1689 (2004) (noting the detrimental effect on the finality of class action suits where adequacy is not properly evaluated and established, opening the door to collateral attacks from absent class members based on inadequate representation).

[119] Rutledge v. Elec. Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975); Thompson v. T. F. I. Cos., 64 F.R.D. 140, 148 (N.D. Ill. 1974).

representation."[120] Because of its powerful binding effect on the class, the class action device may not be used simply for the personal purposes of the named plaintiff, no matter how vigorously the named plaintiff might pursue those interests.[121] Vigorous pursuit of personal interests "would inevitably compromise [the named plaintiffs'] duty to seek and obtain *for the absent class members* the most favorable resolution of [the] dispute."[122]

Further, courts must separately scrutinize the counsel representing the class. Because class counsel has a duty to serve the interests of the named client and the absent class members, a recent amendment to Rule 23 spells out the process a court must use to evaluate class counsel.[123] In

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120 Martinez v. Barasch, No. 01-2289, 2004 U.S. Dist. LEXIS 11019, at *14-*15 (S.D.N.Y. June 11, 2004).

121 *Id*. at *14.

122 *Id*. (internal citations omitted) (emphasis added).

123 *See* FED. R. CIV. P. 23(g):

> (g) Class Counsel.
>
> (1) Appointing Class Counsel.
>
> (A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.
>
> (B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.
>
> (C) In appointing class counsel, the court
>
> (i) must consider:
>
> the work counsel has done in identifying or investigating potential claims in the action,
>
> counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
>
> counsel's knowledge of the applicable law, and
>
> the resources counsel will commit to representing the class;
>
> (ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
>
> (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and
>
> (iv) may make further orders in connection with the appointment.
>
> (2) Appointment Procedure.
>
> (A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

making this inquiry, a court may consider a wide range of factors, including the attorney's interests, competence, experience with similar class actions, and professional integrity.[124] Class counsel must be

> (B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.
> (C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

Id.; *see also supra* note 84. While the guidelines espoused in Rule 23(g) were new in the 2003 amendment to Rule 23, the concept of evaluating the adequacy of class counsel is not new at all. In fact, prior to the 2003 amendment that created subsection (g), the Rule 23(a)(4) adequacy requirement was viewed as encompassing three separate but overlapping elements: "(1) the chosen class representative cannot have antagonistic or conflicting claims with other members of class, (2) the named representative must have 'a sufficient interest in outcome to ensure vigorous advocacy,' and (3) *counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct proposed litigation vigorously*." Wagner v. NutraSweet Co., 170 F.R.D. 448, 451 (D. Ill. 1997) (emphasis added). The amendment gave courts specified guidelines to use in evaluating class counsel, but the concerns addressed by those guidelines have been part of courts' considerations under Rule 23(a)(4) even before such specific guidelines existed. Gill v. Monroe County Dep't of Soc. Servs., 92 F.R.D. 14, 16 (N.D.N.Y. 1981) (declaring it the duty of the class representative to select, actively supervise, and question the class attorney to ensure the counsel is "capable of competently prosecuting the proposed lawsuit"). Indeed, the unique aspects of a class counsel's relationship to the class members has been considered for many years prior to the creation and implementation of Rule 23's subsection (g). Cullen v. N.Y. State Civil Serv. Comm'n, 435 F. Supp. 546, 560 (E.D.N.Y. 1977) (holding that "by granting class status, the court places the attorney for the named parties in a position of public trust and responsibility, and in effect creates an attorney-client relationship between the absentee members and the attorney"); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 21 (6th ed. 2002) (observing the original notions of client-attorney relationships, which must by necessity be greatly altered when an entire class of plaintiffs is represented). Gillers quoted Lord Brougham's statement that "'an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client'" GILLERS, *supra*, at 21 (citing 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

[124] *See* Underwood, *supra* note 75, at 790. It is not imperative in the context of individual litigation for the courts to scrutinize the litigants' chosen counsel in this same manner because, unlike absent class members, the individual litigant assumes the risk of choosing his own attorney and participating in his own lawsuit in a way that absent class members, essentially by definition, cannot. *See also* Wolff, *supra* note 102, at 721.

> Just as an individual litigant in a civil proceeding does not enjoy any right of adequate representation that could enable him to escape the effects of a judgment, and hence assumes the risk that his lawyers will make bad litigation choices on his behalf, so a litigant assumes the risk that the judgment that results from a lawsuit may compromise other important interests that he possesses. We trust individual litigants to make the necessary choices in navigating these risks. When litigants

qualified, experienced, and "generally able to conduct the litigation," and courts are free to consider any prior instance where the putative class counsel failed to proceed in the best interests of the class.[125] Because the class counsel plays such a pivotal role in class action litigation, any personal interests in the litigation may become suspect and render an attorney improper to represent the class as its legal counsel.[126]

Thus, overlap exists between Rule 11's prohibition on filing papers with improper motive and Rule 23's requirement of adequate representation. A putative class representative whose interest in the litigation is rooted in improper motives would not have virtually the same interest in the litigation as all the absent class members whose motives are proper and rooted in the resolution of legal issues being asserted.[127] Depriving the absent class members of a representative whose motivation is the resolution of those legal issues would deprive them of an advocate who could "be depended upon to bring forward the entire merits of the controversy as protection to their own interests" because, after all, the representative would be seeking to protect a different set of interests than the absent class members.[128] This is true regardless of how enthusiastically and vigorously the putative representative with improper motives might present his or her matter

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> make bad choices, or when they fail to consider the preclusive consequences of a lawsuit at all, we consider it an appropriate expression of litigant autonomy to bind them to the result.

Id.

125 Sullivan v. Chase Inv. Serv., Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978).

126 *See, e.g.*, Bachman v. Pertschuk, 437 F. Supp. 973, 977 (D.D.C. 1977) (noting that because the putative class counsel fit into the class he sought to represent, a risk existed that he could be accused of providing inadequate representation in return for personal benefit, and that his interests as a class member could lead to more vigorous representation of those class interests that most closely aligned with his own interests, rather than adequately representing all class interests); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 554 (S.D.N.Y. 1972) (noting that the class action device makes feasible small suits that would otherwise be infeasible, thereby encouraging litigation, which in turn invites the solicitation of litigation, offering class counsel legal fees that far outweigh the expected recovery for the class members and thus stimulating personal interests in the class counsel that may not be completely antagonistic to the class members, but that also do not simply represent the interests of the class members). *Accord* Goland, *supra* note 28, at 449 (noting that it is, in practice, the advocates for the parties rather than the parties themselves who become primarily responsible for conducting the litigation, as it is the counsel that selects the legal theories pursued, develops the evidence, conducts discovery, and tries the case).

127 *See supra* note 102 and text accompanying note 103. For a brief illustration of the problem with having absent class members being represented by differently-motivated class representatives, see *infra* text accompanying note 157.

128 *See supra* notes 104, 122 and accompanying text.

before the court.[129] Likewise, and perhaps even more troubling, an attorney seeking to represent a class who is driven by personal interests and improper motives is "suspect" in the court's scrutiny, because the counsel should proceed in the best interest of the entire class.[130] The intersection of Rule 11's improper motive prohibitions with Rule 23's protections for class members is more than mere academic conjecture. Recent congressional action acknowledged class actions as an increasingly prevalent form of litigation and recognized the manifold dangers inherent in class action litigation when the concerns at the intersection of Rule 11 and Rule 23 are not sufficiently addressed.[131]

C. Following the Compass at the Fork in the Path: Where Rule 11 and Rule 23(a) Meet

When Congress passed the Class Action Fairness Act of 2005 ("CAFA"), it presented a series of findings acknowledging the increasing prevalence of class actions in the legal arena, and some of the concerns inherent in the use of such actions.[132] While Congress called class actions "an important and valuable part of the legal system," it also found that there had been abuses of the class action device that undermined public respect for the judicial system and harmed not only class members with legitimate claims, but also defendants who had acted "responsibly."[133] Further, Congress stated that the purposes of CAFA included assuring fair and prompt recoveries for class members asserting legitimate claims, allowing federalization of "interstate cases of national importance," and benefiting society as a whole with lowered consumer prices.[134]

Thus, Congress painted with broad strokes the base layer for further inquiry into the overlapping territories of Rule 11 and Rule 23(a). While never explicitly referring to the "improper motives" described by Rule 11, Congress expressed in CAFA the view that attorneys often have strong personal incentives attached to class actions because of the windfall legal fees they stand to reap, perhaps even above and beyond any incentives relating to actual representation of the class members' interests.[135] Congress also opened the door for further inquiry into

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129 *See supra* note 120 and accompanying text.

130 *See supra* notes 125-26 and accompanying text.

131 *See infra* Part II.C.

132 *See* Pub. L. No. 109-2, 119 Stat. 4 (2005); Rick Knight, *The Class Action Fairness Act of 2005: A Perspective*, FED. LAW., June 2005, at 47-48.

133 Pub. L. No. 109-2, § 2(a)(1)-(2), 119 Stat. 4-5 (2005).

134 Pub. L. No. 109-2, § 2(b), 119 Stat. 5.

135 *See* Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4 (finding that "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . counsel

motives by including in its findings the idea that responsible defendants are being harmed through abuses of the class action device.[136]

Therefore, especially in light of the recent passage of CAFA, plaintiff and defense bars alike are presented with the query: Where do Rule 11's mandates regarding proper motives and the varying circuit courts' interpretations of that Rule coincide with Rule 23(a)'s mandates of adequate representation for all class members and concerns regarding class counsel's potential personal interests?

III. ANALYSIS: LEARNING TO READ THE ROADMAP

For nearly seventy years, the American bar and judiciary have struggled to interpret, use, and follow Rule 11.[137] Courts have dealt in varying ways with the Rule's requirement that papers be filed without improper motive, alternately deciding to read the Rule's text literally, to disregard it, or use it only in those instances where the first prong of Rule 11 (frivolous filings) is also affected.[138] These decisions have created a crossroads in federal jurisprudence, and the increasing use of class actions as a litigation device, as well as CAFA's push toward federalizing the bulk of class actions, demands that some uniform method be established to handle Rule 11's improper motive prong relative to class actions.[139] It is time to choose, at the junction of these

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are awarded large fees, while leaving class members with coupons or other awards of little or no value"). *See, e.g.*, Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996). The court in *Kamilewicz* called "questionable" a state court's finding that attorney fees in a class action suit were reasonable where the class members each recovered less than $10, but were forced to pay the class counsel nearly $100 in fees. *Id*. at 511. However, the circuit court affirmed the district court's determination that it was barred from reconsidering the state court's decision by the Rooker-Feldman doctrine, which declares that the lower federal courts are not to be used for appellate review of state court decisions. *Id*. at 509, 511. Thus, the class action plaintiffs were left with a positive recovery on the court records, but a negative value to their bank accounts in reality. *Id*. at 511. *See also* Roger Parloff, *Coughing It Up*, N.Y. TIMES, Sept. 24, 2000, § 7, at 17 (reviewing a book, *Civil Warriors: The Legal Siege on the Tobacco Industry* by Dan Zegart, and noting the instance of a lawsuit led by a small law firm attorney, Ron Motley, who stood to earn more than one billion dollars in legal fees for his role as class action attorney in the action against the tobacco industry); Monica Roman, *A Blockbuster of a Legal Bill*, BUS. WEEK, June 14, 2001, at 46 (observing that despite a legal victory for the class action plaintiffs in a suit against "video rental giant" Blockbuster, the "real winners" were the class attorneys who were awarded $9.25 million in fees, whereas the class members were awarded coupons for video rentals).

136 Pub. L. No. 109-2, § 2(a)(2)(A), 119 Stat. 4.

137 *See supra* note 16 and accompanying text.

138 *See supra* Part II.A (examining the majority interpretation of Rule 11's improper motive prong); *supra* Part II.B (explaining the minority interpretation and use of Rule 11).

139 *See generally supra* Part II.C (giving a brief summary of CAFA and Congress' related concerns about class actions).

crossroads, which direction will be pursued and developed, and which will be relegated to jurisprudential history.

Accordingly, this Part will examine two options for approaching the improper motive analysis demanded by Rule 11 in the realm of federal class actions. Part III.A of this section begins with a discussion of why the refusal to acknowledge an overlap between Rule 11's improper motive prong and the concerns embedded in Rule 23's class action requirements creates instability and uncertainty in federal jurisprudence.[140] Next, Part III.B explores the implications for class action filings using the Ninth Circuit's determination that non-frivolous claims cannot violate Rule 11's improper motive prong.[141] This Part will demonstrate that such a reading, especially as applied to class actions, eviscerates the two-prong structure of Rule 11 and decimates the spirit of Rule 23's typicality and adequate representation requirements.[142] Finally, Part III.C of this section examines the Seventh Circuit's interpretation of Rule 11's improper motive prong, and how such an interpretation most closely comports with the Rule 23 requirements of typicality and adequate representation, as well as most effectively provides an answer to Congress' concerns voiced in CAFA's findings.[143]

A. Separated Means Complicated: An Example of Confusion To Come

As the situation currently stands, the court in which a complaint is filed may make the difference between whether the party filing that complaint receives sanctions, and whether that action is allowed to proceed without interruption. A complaint that may, for instance, be seen as inherently nonviolative of the improper motive prong in the Ninth Circuit may result in sanctioning by the Seventh Circuit.[144] While this schism between circuits may be problematic on its own, it is further complicated when the complaint in question relates to a class action, which may well extend beyond state or circuit boundaries, encompassing large numbers of class members.[145]

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140 *Infra* Part III.A.

141 *See supra* notes 31, 41, and accompanying text.

142 *Infra* Part III.B.

143 *Infra* Part III.C.

144 *See supra* text accompanying note 18 (observing the schism between the circuits relative to Rule 11 interpretation); *supra* note 25 (summarizing the Ninth Circuit—the majority—position); *supra* note 59 (describing the Seventh Circuit—the minority—position).

145 *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 820 (1999) (calling the number of individual cases being pending in federal courts "elephantine" and thus requiring class

Thus, envision a hypothetical situation in which a class action complaint is filed in the Ninth Circuit: plaintiffs file a complaint against a large corporation, alleging sex discrimination, filed with the underlying and central purpose of economically damaging the defendant corporation.[146] This Note shall refer to these as the "ulterior motive-focused" plaintiffs or parties. Their complaint would be allowed to proceed in the Ninth Circuit despite its arguably improper purpose because it is non-frivolous.[147] This class includes plaintiffs from across the nation, and thus encompasses class members whose central purpose and interest in the action is the vigorous pursuit of the issue of sex discrimination in the defendant corporation. This Note shall refer to these as "issue-focused" plaintiffs, who may or may not agree with the purpose of economically damaging or embarrassing the defendant corporation, but at the very least, do not consider that purpose central to their lawsuit.[148]

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action treatment); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997) (observing the parties included in the proposed class definition numbered into the hundreds of thousands and perhaps into the millions); *In re* Monumental Life Ins. Co., 365 F.3d 408, 411-12 (5th Cir. 2004) (describing the lawsuit where each plaintiff had a relatively small claim, but where such a large number of plaintiffs existed that it rendered a sizeable liability to the defendant, the "ultimate negative value class action lawsuit"). A negative value suit is one where class members' claims could not be economically litigated individually, but may be brought as a class action to achieve a recovery that would otherwise be barred by economic concerns. *See Monumental*, 365 F.3d at 412 n.1; *see also* Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1985).

146 This example is a fictional case, based very loosely on the structure of a real-life class action lawsuit. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004). However, while the *Dukes* case provided a starting point for the fictional example used in this Note, this is not meant to suggest or imply that the *Dukes* plaintiffs had any improper motive. Their case has been greatly fictionalized and is used for illustration purposes only.

147 *See supra* note 41 and accompanying text. The Ninth Circuit (as generally joined by the Second and Fifth Circuits) contends that a determination of frivolousness is necessary to justify a finding of improper purpose, and that if a paper is not proven to be frivolous, then any subjective reasons for its filing are irrelevant. *See, e.g.*, Sussman v. Bank of Isr., 56 F.3d 450, 455 (2d Cir. 1995); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990). The Fifth Circuit adheres to a test slightly more flexible than the Ninth Circuit's, permitting a finding of improper purpose where "unusual circumstances" exist. *See supra* note 51 and accompanying text. However, the Fifth Circuit is still properly grouped with the Ninth Circuit despite this apparent "loophole" in its Rule 11 jurisprudence because, as of 2003, only once had the Fifth Circuit court deemed any circumstances in a case "unusual" enough to warrant sanctions for improper purpose. *See* text accompanying notes 46-51.

148 *See supra* text accompanying note 68. The Seventh Circuit (as joined by the Fourth Circuit in its *Kunstler* opinion) demands that even if litigants undertake a lawsuit with mixed motives, as is often the case, the purpose of litigating and vindicating the legal issues asserted in the complaint be central and sincere in order to pass muster under the Rule 11 improper motive prong. *See, e.g.*, *In re* Kunstler, 914 F.2d 505, 518 (4th Cir. 1990).

Seventh Circuit jurisprudence would indicate that the complaint filed for the purpose of publicly embarrassing and economically harming the defendant corporation should be sanctioned as having an improper purpose under Rule 11, but that the complaint filed for the purpose of litigating the sex discrimination issue be permitted to proceed.[149] The Ninth Circuit jurisprudence produces an entirely different result, not only allowing the former complaint to proceed, but locking into its definition of a "class" all those members whose central purpose in the lawsuit is litigating the legal issue.[150]

As the case example illustrates, the circuit split in Rule 11 interpretation will breed confusion, uncertainty, unfairness, and inconsistency in federal class actions. If the complaint in the example were read under Ninth Circuit jurisprudence and thus allowed to proceed unsanctioned, all the issue-focused class members caught up in the class definition would be "represented" by ulterior-motive focused plaintiffs whose interests in the litigation were not "typical" by Rule 23's required standards.[151] The rights and recoveries of those issue-focused class members in the lawsuit would be guided and ultimately determined by advocates whose primary focus and central purpose in the action would be to harm and embarrass the defendant.[152] While harming and embarrassing the defendant may also produce some recovery for the issue-focused class members, their rights and the merits

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[149] *See supra* notes 59-60 and accompanying text. The Seventh Circuit asserts that a facially non-frivolous legal claim is not enough to survive Rule 11 scrutiny. Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987). The reason for filing or pursuing the claim must be considered as well, and where that reason is for an improper purpose, it is irrelevant that the claim may also state a non-frivolous issue; it is still sanctionable. *Id*.

[150] *See supra* note 41 (describing the Ninth Circuit's *Westlake North* holding that no non-frivolous papers can violate Rule 11, no matter what "purposes" prompted their filing); *supra* note 80 (discussing the requirement that class be definable, and the difference between an injury-related state of mind inquiry, and an improper-purpose related state of mind inquiry).

[151] *See supra* notes 87-88 and accompanying text (explaining the typicality requirement of Rule 23).

[152] *See supra* notes 88-89 (noting that while some *factual* variation may exist between the claims of the putative representatives and the absent class members, the *interests* of both sets of parties must be so coextensive that the absent members are assured that no part of their claim will be unrepresented or underrepresented by the named plaintiffs); *see also* Underwood, *supra* note 75 at 817-18 (noting the characterization of some class action litigation as "legalized blackmail"); *supra* note 61 (discussing various criticisms of the legal profession spurred by the growing public awareness of and displeasure with "predatory litigation"); *supra* text accompanying note 133 (noting Congress' concerns expressed in CAFA's findings regarding the harm to responsible defendants caused by some class action litigation).

of their claims would clearly not be presented with the vigor, focus, and emphasis afforded by Rule 23's requirements of typicality and adequate representation.[153]

This situation will not only encourage class action forum shopping among the federal circuits, but it will also render the judgments and settlements in those actions subject to reopening, thereby leaving the suits with tenuous finality, at best.[154] In the case example above, the class members whose central purpose focused on the legal issue rather than on potential harm to the defendant could collaterally attack any judgment or settlement produced in the action on the basis of inadequate representation.[155] Pursuant to Rule 23's protections of typicality and adequate representation, the ulterior-motive focused plaintiffs (whose central purpose clearly differed from that of the issue-focused plaintiffs) were not actually adequate representatives for the entire class.[156]

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[153] *See supra* text accompanying notes 99-101 (assessing the overlap of Rule 11 motive concerns with the protections afforded by Rule 23's typicality prong); *supra* text accompanying notes 127-30 (examining the interplay between Rule 11 motive concerns and the protections afforded to absent class members by Rule 23's adequate representation prong).

[154] *See* Mullenix, *supra* note 118, at 1691 (describing the possibility of collateral attacks based on inadequate representation as "the singlemost threatening challenge for the resolution of aggregate disputes through the class action mechanism"). Mullenix asserts that courts, plaintiffs, and counsel alike, do a poor job of protecting the absent class members through a thorough determination of adequate representation at the front-end of the class action suits. *Id*. *See accord* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000) (noting the Supreme Court's warning that its view of the theory of adequate representation is yet embryonic, and may develop into a "due process limitation upon the ability of class counsel to resolve the legal rights of absent or non-consenting class members"); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 571 (1997) (observing courts and commentators view of adequate representation in the wake of *Hansberry* as being the "touchstone of due process," over and above even an individual opportunity to be heard). Thus, it is well-documented that a lawsuit's finality is significantly weakened when a class action is allowed to proceed with questionable protection for the absent class members' adequate representation rights.

[155] *See supra* note 116 (discussing the *Hansberry* ruling and noting that deeming a class representative "adequate" for Rule 23 purposes ascribes to them a power and responsibility with regard to the absent class members' rights that cannot be discharged if the representative's central purposes differ or conflict with those of the absent members).

[156] *See supra* text accompanying notes 120-22 (explaining that vigorous pursuit of purposes not central to and shared by the absent class members compromises the representative's duty to the absent class members to seek and obtain the most favorable possible resolution of their dispute). The class action device is a particularly poor vehicle for asserting personal purposes and interests, far more so than individual litigation, because of the binding effect the action has on all absent class members. Martinez v. Barasch, No. 01 2289, 2004 U.S. Dist. LEXIS 11019, at *14-*15 (S.D.N.Y. June 11, 2004). Even

It is easy to see how this could lead to direct conflicts of interest between the class members. For example, if the defendant corporation were willing to settle quickly and quietly with changes to its corporate infrastructure to better protect against sex discrimination, the named plaintiffs would likely reject such an offer in favor of more public litigation and media attention, whereas the issue-focused class members would be deprived of an arguably ideal resolution to their issue.[157] Such a conflict of interests, as firmly established in *Hansberry* and its progeny, is grounds for collaterally attacking whatever resolution is achieved in the lawsuit.[158]

This example is fictional, but its structure is taken from an actual lawsuit, and similarly structured suits appear on court dockets across this country.[159] This dilemma presents countless situations in which ulterior-motive focused class members, whose complaint would be sanctioned in some circuits but not in others, directly conflicts with the interests of issue-focused members within the class.[160] A class action being pursued for ulterior motives, and arguably improper purposes, thus creates an atmosphere of uncertainty among litigants and the judiciary, because the finality of any judgment or settlement essentially turns on: (1) whether other issue-focused class members never discover that their rights were determined by parties whose purpose and interests differed from their own; or (2) how the circuits finally resolve their conflicted readings of Rule 11's improper purpose prong, so that its effect on typicality and adequate representation in class actions can finally be standardized.

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if the conflicts between motive-focused and issue-focused plaintiffs would be revealed by a court's thorough evaluation under the current Rule 23(a), there currently exists no uniform method of judicial reasoning to ensure that those conflicts actually result in sanctioning or denial of class certification. Especially in a circuit where the idea of "improper purpose" is essentially negated by the existence of a non-frivolous claim, the danger is that the court would declare representation adequate because all putative class members shared the same non-frivolous claim, rather than denying certification because of the differences in motivation. *See, e.g.*, Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990) (holding that improper purpose does not exist unless a filing is determined to be frivolous).

157 *See supra* note 156.

158 *See supra* notes 118, 154.

159 Regarding the case on which the example is very loosely based, see *supra* note 146. Regarding a few examples of large class actions, see cases cited *supra* note 145.

160 Regarding the difference in circuit court's reactions to papers filed with arguably improper purposes, see *supra* Part II.A. Regarding the prohibition on class representatives having directly conflicting interests with the absent class members, see *supra* note 116 and accompanying text.

There are essentially two paths that may be followed at this crossroads. The first would adopt the Ninth Circuit's interpretation of Rule 11's improper motive prong, essentially obliterating the current dual-prong obligations imposed by Rule 11, and rendering issue-focused class members stuck in ulterior motive-focused classes without remedy or protection.[161] The second path would adopt the Seventh Circuit's interpretation of Rule 11, reading it as the text and historical development of the Rule implies, giving credence to both prongs of the Rule and requiring that papers be filed without improper purpose.[162] This path would lead to greater protections for the issue-focused class members as intended by Rule 23 and, thus, greater finality in the judgments and settlements produced in large class actions.[163]

B. Eviscerate and Decimate: The Perils of Adopting Ninth Circuit Rule 11 Jurisprudence

Adopting the Ninth Circuit's interpretation of the Rule 11 improper purpose prong would, essentially, eviscerate the dual-prong structure of Rule 11.[164] Reading Rule 11's improper purpose mandate as being fulfilled whenever its "frivolous filings" mandate is met basically condenses the Rule 11 inquiry into a one-step process, rather than two separate steps as the text of the current Rule requires.[165] The Ninth Circuit itself has admitted in its opinions that its reading of Rule 11 does not comport with the text of the rule.[166] Adopting the Ninth Circuit's interpretation, therefore, ignores the text of Rule 11 and ignores the dual purposes the Rule was intended to serve.[167]

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161 *See infra* Part III.B.

162 *See supra* Part II.A.2 (discussing the minority position regarding Rule 11 asserted by the Seventh Circuit).

163 *See infra* Part III.C.

164 *See supra* note 31 (highlighting the Ninth Circuit's admission that its assertion that Rule 11's improper purpose prong is not independent from the frivolousness prong comes "despite" the Rule's text, rather than because of it). *Cf. infra* note 191 (explaining the drafters' apparent intent to preserve the dual prong structure of Rule 11).

165 *See supra* notes 31, 164; *see also supra* note 16 (explaining Rule 11 from inception to present-day and presenting its text).

166 *See supra* note 31 and accompanying text (observing the Ninth Circuit's admission that its interpretation of Rule 11 comes not *from* the language of the Rule, but "despite" the language of the Rule).

167 *See* Mazurczak, *supra* note 16, at 106 (noting that Rule 11's improper purpose clause is separate and independent from the frivolousness clause). Mazurczak asserts that the second prong of Rule 11, the improper purpose clause, addresses the problem of abusing the legal system in an attempt to pursue personal or economic harassment. *Id*. This clearly conflicts with the Ninth Circuit's reading of the Rule, as an attempt to pursue personal or

Moreover, the evisceration of Rule 11's dual-prong structure causes acute harm when applied to class action litigation and would decimate protections afforded absent class members under the typicality and adequate representation requirements of Rule 23.[168] First, ignoring the dual prongs of Rule 11 would wreak havoc on the typicality requirement of Rule 23 because typicality requires a court's determination that the class representatives share with the absent class members the degree of importance and centrality assigned to the issues in the claim.[169] If the Ninth Circuit's interpretation of Rule 11 is adopted uniformly, then any colorable claim would automatically pass the Rule 11 test, simply because it states a non-frivolous legal issue.[170] However, it would create a legal fiction in that the ulterior motive-focused plaintiffs could "pass off" the claims and interests of the issue-focused plaintiffs as their own, simply because each group would be able to file facially identical complaints.[171]

Even assuming that all the plaintiffs—ulterior motive-focused and issue-focused alike—suffered injury in the same general fashion, the Rule 23 typicality requirement is ill-served by glossing over the Rule 11 motive concerns.[172] The general similarities in injury suffered would permit each group of plaintiffs to file facially similar complaints and pass the Ninth Circuit's Rule 11 test.[173] However, the arguments and assertions of the ulterior motive-focused plaintiffs can hardly be said to vigorously, fairly, and thoroughly encompass the arguments and assertions of issue-focused plaintiffs, precisely because the ulterior motive-focused plaintiffs will have different incentives in the action than the issue-focused plaintiffs.[174]

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economic harassment would still pass its Rule 11 muster so long as the filing was non-frivolous. *See supra* note 147.

168 *See supra* text accompanying notes 99-101 (examining the overlap and interplay of Rule 11's improper purpose concerns and Rule 23's typicality requirement); text accompanying notes 127-30 (explaining the overlap and interplay of Rule 11's improper purpose concerns and Rule 23's adequate representation requirement).

169 *See supra* note 87 and accompanying text.

170 *See supra* note 147.

171 *See supra* text accompanying note 113 (noting that a party is not properly joined to a class action merely because he appears to superficially fit into the class).

172 *See supra* text accompanying note 91.

173 *See supra* note 147 (stating that a colorable claim alone is sufficient under Ninth Circuit jurisprudence to pass Rule 11 scrutiny, despite any differences in motive or purpose).

174 *See supra* text accompanying notes 83, 91-92. It is, perhaps, disconcerting to note that in practice, the enforcement of typicality and adequate representation comes primarily through challenges from the defendant facing a class action lawsuit. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation:*

Thus, stripping Rule 11 of its independent prongs and dual concerns in turn robs class members of a vital element in their typicality protection. The typicality prong of Rule 23 is intended to protect class members from unnecessarily involving their legal rights in an action when the class representatives have different stakes or incentives in the action, or where the representatives would not ensure that all significant aspects of all class members' claims are vigorously and adequately asserted.[175] If courts assume that a class representative may properly proceed with a claim simply because the claim asserts a non-frivolous legal issue, without also determining whether the purpose of the claim is actually the assertion of that legal issue, all other class members face the involvement of their rights in a litigation pursued by a representative who may well have varying—or outright conflicting, as the case example above illustrates—interests.[176] This flies in the face of Rule 23's intended protection under the typicality prong.[177]

Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1, 63 (1991). Naturally, this results in the absent class members' protection depending upon the challenges brought by a party whose interests and objectives are likely diametrically opposed to that of the plaintiffs. *Id*. The defendant challenging the class action will argue that the class should not be certified because the putative representatives are not sufficiently typical of the class and do not provide adequate representation for the absent class members, thus presenting arguments colored with the very concerns the absent class members themselves might feel. Sanderson v. Winner, 507 F.2d 477, 480 (10th Cir. 1974); Umbriac v. American Snacks, Inc., 388 F. Supp. 265, 275 (E.D. Pa. 1975) (observing that "defendants, who naturally have no interest in the successful prosecution of the class suit against them, are called upon to interpose arguments in opposition to class determination motions verbally grounded upon a concern for the best representation for the class while the implicit, but nonetheless real, objective of their vigorous legal assaults is to insure no representation for the class") (internal quotations omitted). This further supports the notion that purposes of the named plaintiffs must be examined and considered as part of the Rule 23 requirements, because other than the court's scrutiny, the absent class members are left to rely generally upon their *opponent's* challenges and arguments regarding their "best representation" to enforce their Rule 23 protections. *Umbriac*, 388 F. Supp. at 275; Macey & Miller, *supra* note 174, at 63.

175 *See supra* notes 87-88.

176 *See supra* text accompanying notes 146-48 (establishing the case example). Regarding the class representatives' duties to the absent class members, see *supra* note 156.

177 *See supra* text accompanying notes 91-92; *see also* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 251 (1987). Yeazell argues that typicality and adequate representation are essentially inextricably bound up with one another: "Typicality appears to be a means to the end of adequate representation, while adequate representation of interests appears to be the end itself." *Id*. Yeazell's argument is supported by other scholars who observe that the determination of adequate representation often merges with typicality, and typicality acts as a checkpoint for making sure the absent members are adequately protected by their class representatives. *See, e.g.*, Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. REV. 1139, 1163 (1999). Based upon Yeazell's and Boyd's

Moreover, the protection afforded class members by Rule 23's adequate representation requirement will be similarly decimated upon adoption of the Ninth Circuit's interpretation of Rule 11.[178] Adequate representation requires that class representatives have virtually identical interests in the litigation as all class members are bound to the litigation's result, but it quickly becomes clear that ulterior motive-focused litigants will likely have starkly different interests in the litigation from their issue-focused counterparts.[179] When absent class members' rights depend upon a representative vigorously asserting the entire merits of the controversy, whether that representative is driven to protect the same interests in the matter as the absent members must be a foremost concern.[180]

Under the Ninth Circuit's Rule 11 interpretation, class representatives filing a non-frivolous claim cannot be said to have an improper purpose.[181] Unfortunately for the issue-focused class members represented by an ulterior motive-focused plaintiff, though, that interpretation falls far short of protecting the issue-focused members given that a motive-focused representative has starkly different interests from those of the absent members and cannot be trusted to fully and zealously advocate the real issues in controversy.[182] This directly

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assertions, typicality is likely interconnected enough with adequate representation that a questionable determination of typicality as would result from ignoring the Rule 11 improper purpose prong would actually cast doubt upon the determination of adequate representation.

178 *See supra* text accompanying notes 102-04 (setting forth the basic principles embodied by the adequate representation requirement).

179 Regarding the necessity of virtually identical interests between class representatives and absent class members, see *supra* note 103 and accompanying text. For the case example illustrating a conflict of interest between the issue-focused plaintiffs and the ulterior motive-focused plaintiffs, see *supra* note 156 and text accompanying note 157.

180 *See supra* note 104 and accompanying text; *see also supra* note 174 (explaining that after the court's required determination of Rule 23 prerequisites, the absent class members' enforcement of Rule 23 protections usually depends upon the defendant opposing the class action).

181 *See supra* note 31 and accompanying text.

182 *See* FED. R. CIV. P. 23(a)(4) (requiring class representatives to "fairly and adequately protect the interests of the class"); *supra* note 104 and accompanying text. The dangers to absent class members engendered by conflicts in purpose between them and the named plaintiffs are not unique to just the parties in the suit. This Note focuses on the conflicts between class members, but it must be noted that the motive of the class counsel must be examined as well, as examples of those interest conflicts are easily created and are just as potentially damaging to the class members. *See* FED. R. CIV. P. 23(g); *supra* note 123 (discussing Rule 23(g)); *supra* notes 123-26 and accompanying text (examining the importance of a class counsel who lacks "improper motive" to absent class members). *See also* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003). Redish emphasizes

conflicts with the Supreme Court's ruling in *Hansberry*, in which the Court asserted that superficial fit in a class description is not alone sufficient to bind the purported class members.[183]

The Ninth Circuit's Rule 11 interpretation, as applied to class actions, supports the direct opposite result from *Hansberry*: the superficial class

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that the general public is affected by this situation too, because substantive law may be affected through a class action pursued by a "bounty hunter" attorney, when that litigation is pursued for purposes other than vindication of the class member's rights and claims:

> [A]ll too often the [class action] device permits the transformation of the remedial enforcement model expressly adopted in the underlying substantive law from a victim's damage award structure into an entirely distinct form not contemplated in the underlying substantive law. In such cases, the suits are not, in any realistic sense, brought either by or on behalf of the class members. The class members neither make the decision to sue at the outset nor receive meaningful compensation at the end. Instead, in these suits, as a practical matter, it is the private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations. In effect, the promise of substantial attorneys' fees provides the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior. Thus, what purports to be a class action, brought primarily to enforce private individuals' substantive rights to compensatory relief, in reality amounts to little more than private attorneys acting as bounty hunters, protecting the public interest by enforcing the public policies embodied in controlling statutes.

Id. at 77. Redish refers to these lawsuits as "faux" class actions. *Id*. Moreover, returning to the focus on the conflicts of purpose and interest between class members, Redish notes that class members motivated by those purposes the Seventh Circuit would call improper under Rule 11 may actually be *constitutionally* improper in pursuing the litigation:

> *Would-be plaintiffs who are motivated exclusively by altruistic or ideological concerns may not, as a constitutional matter, invoke the federal judicial process*. Unless the plaintiff has suffered some form of personal injury traceable to the defendant's violation of law and remediable by judicial action, she constitutionally lacks the standing necessary to invoke the federal courts' jurisdiction. It surely does not follow, however, that federal adjudication is incapable of advancing social, economic, or political interests that extend well beyond the personal interest of the individual litigant. It means, simply, that whatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests.

Id. at 86 (emphasis added). Redish's assertions give further weight to the plight of the issue-focused absent class member who faces being bound to the result of a litigation pursued by class representatives or class counsel motivated by personal economic incentives, or even by "altruistic" and "ideological" purposes.

[183] *See supra* text accompanying note 113. The inherent dangers of conflict between class members in class action lawsuits have been recognized by courts. *See, e.g.*, Mendoza v. United States, 623 F.2d 1338, 1346 (9th Cir. 1980); *In re* PaineWebber Ltd. P'shps Litig., 171 F.R.D. 104, 123 (S.D.N.Y. 1997) ("Potential conflict between class members is often a danger in large class actions.").

description—all class members who can assert as a non-frivolous claim the issues presented in the complaint—would determine whether the claim could progress.[184] Because the Rule 11 motive inquiry is subsumed by the non-frivolous inquiry, the superficial fit of a putative class representative into a class description would suffice, as further inquiry into the purpose behind the claim would be deemed inappropriate so long as the claim was not frivolous.[185] Clearly, this interpretation of Rule 11 as applied to class actions not only ignores the text of Rule 11, but overlooks the mandate of the Supreme Court to bind only those class members whose "substantial interest" is identical to that of the representative parties.[186]

This is more than a mere academic concern: it is a violation of the absent class members' due process rights to be bound by a judgment in which their only representation was by a party whose substantial interest was most likely not the same as their own.[187] The Supreme Court realized the importance of the class representatives sharing the same motive and purpose as the absent class members, noting that ascribing the representatives the power to adjudicate the rights of others who did not share their central purpose would provide opportunities for fraud and collusion and ultimately the sacrifice of the absent class members' rights.[188]

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184 *See supra* note 183.

185 *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 150-51, 157-58 (1982). The Court held that Rule 23's requirements of a class representative cannot be inferred simply because the putative representative superficially fits the proposed class description, as conflicts between the putative representative and other class members may still render that party an inappropriate class representative, despite his fit into the suggested class description. *Id*. at 157-58. For further discussion of the *Falcon* case, see *supra* notes 93-98 and accompanying text. While Rule 23 gives courts the freedom to inquire further into the possible differences between putative class representatives and the absent class members, it remains problematic and troubling that such inquiry is nowhere made uniform, and each court's inquiry is likely to be shaped and strongly influenced by the individual circuit's interpretation of motives vis-à-vis non-frivolous claims. *Supra* note 156. As demonstrated by the *Hansberry* case, the "possibility" of protection is not sufficient; only a guarantee of truly adequate protection is constitutionally sufficient. Hansberry v. Lee, 311 U.S. 32, 45-46 (1940); *supra* notes 116-17 and accompanying text. Thus, the fact that some courts *might*, by the freedom granted to them to inquire further under Rule 23, conclude that differences between motive-focused plaintiffs and issue-focused plaintiffs warrant class certification denial simultaneously demonstrates that some courts might *not* reach that conclusion, thereby illustrating the need for a uniform solution to this quandary.

186 *See supra* text accompanying notes 113, 116; *supra* note 115.

187 *See supra* note 116 and accompanying text.

188 *See supra* note 116 and accompanying text.

Therefore, the perils of adopting the Ninth Circuit's interpretation of Rule 11 are severe and of immediate import, especially given the pervasive use of class actions across the country. It is simply not enough protection to claim ignorance to the underlying purpose behind a putative representative's claim when the rights of other class members also hang in the balance.[189] Evisceration of the dual prongs of Rule 11 and refusal to abide by its admonishment of improper purpose in filing claims leads to nothing short of the decimation of the due process rights currently protected by Rule 23's typicality and adequate representation requirements.[190]

C. *Integrate and Reinvigorate: Protecting Rule 23's Protections by Adopting the Seventh Circuit's Rule 11 Jurisprudence*

Adopting the Seventh Circuit's interpretation of Rule 11 and integrating it with the Rule 23 considerations not only comports with the text and spirit of each Rule, but reinvigorates the protections extended by Rule 23's typicality and adequate representation prongs. The text of Rule 11 clearly mandates a consideration of two independent concerns, and the amendments to the Rule since its inception in 1938 indicate a continued adherence to the dual prong structure.[191] The independence of these prongs, and the need for separate consideration of improper purpose, become even clearer when applied to federal class action lawsuits.[192]

First, the dual prong structure more closely comports with the intent of both the typicality and the adequate representation requirements of Rule 23.[193] Typicality requires the court to evaluate the purposes prompting the putative representatives to bring the claim, as the court

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189 *See supra* note 182.

190 *See supra* note 164.

191 *See supra* note 26. From its inception, Rule 11 has embodied two prongs, two independent concerns. Mazurczak, *supra* note 16 at 106. When the Rule was amended in 1983, not only did the drafters see fit to retain the dual prong structure, but they enhanced the improper motive prong by adding additional examples of improper purposes for which sanctions would be appropriate. *Id.* In the 1993 amendment to Rule 11, the drafters did not alter or amend the improper motive prong whatsoever. Solovy et al., *supra* note 26, at 727-28 n.2. Thus, the history of Rule 11 indicates continued support for and belief in the need for two separate prongs, focusing on two independent sets of concerns.

192 *See supra* text accompanying notes 99-101 (examining the importance of Rule 11's purpose considerations as applied to Rule 23's typicality requirement); *supra* text accompanying notes 127-30. Regarding the general dangers and possible constitutional implications of class actions led by representatives with improper purposes, see *supra* note 182.

193 *See supra* note 78 and accompanying text.

must determine whether the legal issue upon which the claim is based occupies the same level of importance and centrality to the representative as to all absent class members.[194] Similarly, adequate representation requires the court to evaluate whether the named plaintiffs can ensure the protection of all absent class members' interests by demonstrating that their own interest in the litigation is virtually identical to the absent members' interests.[195] Thus, both Rule 23 requirements demand no less than a thorough consideration of the purposes behind the filing of the claim, and denying that consideration deprives the absent class members the protection of being represented by a party whose substantial and central interests align with their own.[196]

Second, adopting the Seventh Circuit's interpretation of Rule 11 answers the outcry of concern from the bar, the judiciary, the legislature, and the general public regarding the growing problems of predatory class action litigation.[197] Integrating the protections of Rule 11 and Rule 23 is a natural reading of the two Rules as their goals complement each other. Requiring that claims be filed without improper motives under Rule 11 helps ensure that the class actions are led by litigants and counsel who will vigorously and thoroughly assert the merits of the legal issues embodied by their claim.[198] Likewise, requiring the central purpose of the class representative to align with and truly reflect that of the absent class members supports the Rule 11 prohibition on improper filings. Requiring plaintiffs' counsel to bring forth and file only those claims for which a definitive class of plaintiffs exists who actually share a central injury reduces the opportunity to file "vexation value" and "predatory litigation" claims that would violate the improper motive prong.[199]

Third, the Seventh Circuit's Rule 11 jurisprudence, as applied vis-à-vis Rule 23's protections for absent class members, would reinvigorate the stability and finality of class action judgments.[200] Under *Hansberry*, due process forbids binding absent class members to judgments in which they were not adequately represented, and especially when their

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194 *See supra* note 87 and accompanying text.

195 *See supra* notes 103-04 and accompanying text.

196 *See generally supra* notes 115-16.

197 *See supra* note 61 (examining several points of view from attorneys, the public, and the judiciary on the problems with class actions pursued for arguably improper motives, calling them predatory or "vexation value" suits); *supra* Part II.C (discussing the concerns Congress expressed in its findings when it recently passed CAFA).

198 *See supra* notes 104, 182.

199 *See supra* notes 152, 197.

200 *See supra* note 154 and accompanying text.

purported "representatives" acted with interests that conflicted with that of the absent class members.[201] When the judiciary integrates the Rule 11 proper purpose concerns with the Rule 23 considerations, it assures more thorough protection for the absent class members whose due process rights would otherwise be jeopardized if the motive of their representative was ignored.[202] Applying the Seventh Circuit's interpretation of Rule 11's purpose prong to class actions would help ensure that the absent class members could receive true adjudication of their rights, and would therefore avoid the unnecessary and unwarranted impingement of their rights by someone who did not share their interest in the legal issue at hand.[203] This added protection for the class members, in turn, produces added stability for the legal system, because by bolstering the typicality and adequate representation prongs of Rule 23, the loopholes through which collateral attacks may be brought are minimized.[204]

Finally, adopting the Seventh Circuit's interpretation of Rule 11 responds to Congress' concerns regarding the personal incentives of attorneys who act as class counsel in class action litigation.[205] While this Part has focused on the interests of the class members involved in class action suits, there are clearly strong personal incentives inherent in an attorney's choice to act as class counsel—not the least of which is the windfall of legal fees.[206] There is certainly no way to detach an attorney's interest in recovering fees from that attorney's decision to act as class counsel. However, unambiguously adopting and enforcing the Seventh Circuit's reading of Rule 11 both alerts attorneys to the possible penalties associated with pursuing blackmail settlements and predatory litigation and empowers courts to assert those penalties when the attorneys fail to abide by the Rule.[207]

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[201] *See supra* notes 104, 113-16, and accompanying text.

[202] *See supra* note 116 and accompanying text (noting that binding a party to a judgment or settlement in which that party was inadequately represented violates due process); *see also* Woolley, *supra* note 155, at 571 (calling adequate representation the "touchstone" of due process).

[203] *See supra* notes 44, 87 and accompanying text.

[204] *See supra* notes 154-58.

[205] *See supra* note 135 and accompanying text.

[206] *Id.*; *see also supra* note 72 (noting the increase in cases where plaintiffs' recoveries are small but the attorneys' awards are large); *supra* note 73 (asserting that attorneys may sell out the interest of the class members in order to maximize their own fee recovery); *supra* note 126 (observing that the legal fees awarded to class counsel often far outweigh any expected recovery for the class members).

[207] *See supra* note 75 (noting concerns about class actions being used as "legalized blackmail" and to leverage unwarranted large settlements); *supra* notes 72, 84, 126, 135, 182

Therefore, in order to simultaneously preserve and respect the protections afforded absent class members through Rule 23's typicality and adequacy requirements, the Seventh Circuit's interpretation of Rule 11 must be adopted. The current state of uncertainty caused by the schism in the circuits' reading of Rule 11 is increasingly disturbing, as large class actions continue to grow as a litigation device and are increasingly federalized through legislation like CAFA. Hence, it is time to acknowledge the overlapping concerns of Rule 11 and Rule 23, to adopt a uniform approach to those concerns, and to officially integrate the Rule 11 consideration of motive or purpose into the class action certification considerations under Rule 23.

IV. A PROPOSED MODEL OF JUDICIAL REASONING: INTEGRATING THE IMPROPER MOTIVE PRONG OF RULE 11 IN RULE 23(a) CLASS CERTIFICATION ANALYSIS

Part IV proposes Model Judicial Reasoning for federal courts to apply in determining whether or not to certify putative classes for class action litigation.[208] This proposed reasoning provides a uniform approach to the Rule 11 improper motive prong as it relates to Rule 23(a)'s requirements of typicality and adequate representation. This uniform approach will eliminate the uncertainty and unfairness currently engendered by the circuit courts' competing interpretations and applications of Rule 11.[209] The proposed reasoning adopts the Seventh Circuit's interpretation of Rule 11 as having two distinct and independent prongs, thereby giving full effect to the protections afforded absent class members by Rule 23(a)'s typicality and adequate representation prongs.[210]

This Note has demonstrated that adopting such model reasoning does not require altering, modifying, or changing what currently exists in the text of the Federal Rules of Civil Procedure.[211] It is instead a

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(examining the influence of improper motives on class counsel, and, in turn, the influence of improperly motivated class counsel on the class members and the resultant litigation).

[208] *See supra* note 81.

[209] *See supra* notes 146-53 and accompanying text (using a hypothetical case situation to illustrate the uncertainty and unfairness presented by the current schism in courts' approaches to Rule 11).

[210] *See supra* Part II.A.2 (presenting and examining the Seventh Circuit's approach to Rule 11 inquiries).

[211] *See, e.g., supra* note 31 (noting that even the circuit courts that do not adhere to the Seventh Circuit's approach to Rule 11's improper motive prong acknowledge that the Seventh Circuit's approach is dictated by the actual text of the Rule, and that a contrary approach is taken *despite* the Rule's text).

matter of confirming to courts that the text of Rule 11 *must* be followed, not just for its own sake, but to effectuate the protections of Rule 23. Therefore, this Part proposes judicial reasoning to be used with the typicality and adequate representation considerations.[212] This reasoning captures the motive requirements of Rule 11, and provides a framework for applying them to class certification determinations.[213] The reasoning is a two-step process, shaped by the structure of Rule 11, and requires the court considering whether to certify a putative class to find:

> *(1) The putative representative has demonstrated the existence of a non-frivolous claim appropriate for class action treatment as defined by the requirements of Rule 23(a); and*
>
> *(2) The court is aware of no evidence, whether formally presented to the court or of which the court has otherwise become aware, indicating that the putative class representative(s) filed the claim identified in Step (1) for any motive:*
>
> > *(a) which is generally improper [an objective component], using an approach guided by the Seventh Circuit's jurisprudence; and*
> >
> > *(b) if generally improper, would so endanger the typicality and adequate representation protections of Rule 23(a) in the case at hand [a subjective component] that class certification must be denied to fully protect the absent class members from the adjudication of their rights in an action in which they were not adequately protected, and thus would be improperly bound to any settlement or judicial resolution of the claim.*[214]

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[212] *See* FED. R. CIV. P. 23(a)(3) (setting forth the typicality requirement); FED R. CIV P. 23(a)(4) (establishing the adequate representation element for class certification).

[213] What constitutes "improper motive" is guided by the Seventh Circuit's jurisprudence. *See supra* Part II.A.2. What is generally an improper motive under the current Seventh Circuit jurisprudence is used to establish the threshold for the objective component of this Model Judicial Reasoning, but is not in itself the end point of the inquiry.

[214] The language of the Model Judicial Reasoning is the author's own original language, based in part upon the Seventh Circuit's reasoning regarding Rule 11's improper motive prong.

A. The Where: Placing Rule 11's Requirements Within Rule 23(a)'s Protections

This Model Judicial Reasoning formally adopts the Seventh Circuit's interpretation of Rule 11, thereby acknowledging the drafters' continued adherence to the dual-prong structure and the independent concerns of each prong.[215] Thus, a judge faced with the decision of whether or not to certify a proposed class must find under Rule 11: (1) that the class's putative representative established the presence of a colorable, non-frivolous claim for all members of the proposed class;[216] and (2) that neither the putative representative nor the class counsel demonstrated any improper motive contrary to or so divergent from the resolution of the non-frivolous claim in prong (1) such that certification of the putative class would result in defeating the typicality and adequate representation protections guaranteed under Rule 23(a)(3) and (4).[217]

This approach to Rule 11's independent prongs in class action situations avoids the problems inherent in forcing a putative class representative or attorney to affirmatively prove a negative; that is, it prevents requiring proof that differing motives *do not* exist among the class members.[218] Rather, this approach acknowledges that where evidence exists that alerts the court to potential motive conflicts among the class members (or between the class members and the class counsel), the court may invoke Rule 11's improper motive prong as a bar to

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[215] *See supra* 191 (identifying a pattern of preserving the dual-prong structure of Rule 11 through its various amendments).

[216] This first part of the inquiry is essentially a restatement of the requirement that papers filed in court be non-frivolous. FED. R. CIV. P. 11. The only modification is the explicit instruction to view the frivolousness issue in the context of all class members, but even that is not a change so much as a verbalization of the basic inquiry conducted in Rule 23(a). FED. R. CIV. P. 23.

[217] The requirement that typicality and adequate representation be assured to absent class members is not itself a change from what is currently required in class certification inquiries. *See supra* Part II.B. The thrust of the proposed reasoning is on the integration of considerations regarding class representatives' and counsel's motives in bringing and pursuing the claim as part of the currently existing typicality and adequate representation inquiries. *See supra* notes 73-77 (assessing the various criticisms and dangers related to claims pursued by class representatives or class counsel whose purpose is sharply divergent from that of the absent class members).

[218] Avoiding the troubling situation of requiring proof of a negative is important for maintaining a relatively efficient and "user-friendly" model of reasoning. *See, e.g.*, Gorney, *supra* note 81, at 51 (describing the task of proving a negative as an "unenviable posture" and noting that it "might be easier to prove the sun rises in the west" than to prove the absence of a fact).

binding all of the class members to one unified adjudication of the colorable claim.[219]

Moreover, this approach acknowledges that claims are often brought with "mixed motives," and this approach does not require that all of those mixed motives claims be barred.[220] Instead, this model instructs the court to reject class certification only for those claims where the demonstrated motives of the putative representative or the class counsel: (1) are improper, as per the Seventh Circuit's interpretation of Rule 11; *and* (2) would, if the class was certified, undermine or altogether eviscerate the Rule 23(a) protections of typicality and adequate representation.[221] Rather than forcing any litigant to prove the absence of such motives, this Model Judicial Reasoning instead places the focus of the inquiry on the effect of any such motives on the protections guaranteed under Rule 23(a).[222] Focusing the inquiry on the effect of the motives, instead of flatly requiring a putative class representative or counsel to prove their complete absence, also helps sidestep the potential "chilling" effect of enforcing Rule 11's improper motive prong.[223] Hence, claims may still be brought even where some mixed motives exist for the class representatives and for the class counsel, so long as the resolution

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219 *See supra* note 102.

220 *See In re* Kunstler, 914 F.2d 505, 518 (4th Cir. 1990) (noting that a lawsuit filed or pursued with mixed motives is not immediately violative of the Rule 11 improper purpose prong, so long as the purpose of vindicating the asserted claim remains central and sincere). Thus, the proposed Model Judicial Reasoning blends the Fourth Circuit's more tolerant stance toward mixed motives with the Seventh Circuit's stricter requirements of what actually constitutes an improper motive for the purposes of determining whether an improper motive, rather than vindication of a legal claim, is central.

221 *See supra* note 217 and accompanying text.

222 Focusing the inquiry on the effects of the motives on the Rule 23 protections helps the proposed reasoning to closely comport with the most prevalent criticisms of current uses (or misuses) of the class action litigation device. *See supra* note 61 (setting forth several criticisms of the current uses of suits motivated by the desire to economically harm or publicly embarrass a defendant); *infra* note 223.

223 *See* Goland, *supra* note 28, at 477. Goland describes the goal of Rule 11 inquiries as achieving a balance between allowing the pursuit of legitimate claims while preserving the integrity of the legal system. *Id.* The reasoning proposed in this Note achieves that balance by acknowledging the impossibility of demanding a stark absence of any mixed motives in class action suits, while still respecting the integrity of the legal system by requiring that where suits are filed with improper motives outweighing the vigorous pursuit of vindicating the claim, a court refuse to certify a class and bind issue-focused plaintiffs to a motive-focused representative's pursuit of the suit.

of the actual claim is of central importance, rather than a secondary (or nonexistent) afterthought.[224]

This allows a consideration of both subjective and objective components. The objective component, encompassed by prong (2)(a) of the proposed Model Judicial Reasoning, focuses on whether the questionable purpose is generally "improper."[225] However, the subjective component, embodied by prong (2)(b) of the proposed Model Judicial Reasoning, focuses more specifically on whether the questionable purpose *in the case at hand* is "improper" relative to its effect on the protections guaranteed to absent class members by Rule 23(a)'s requirements of typicality and adequate representation for the class encompassed by the claim being asserted.[226]

B. The What and the How: What Improper Motive Evidence Should Be Considered

Evidence of improper motives may come to the court's attention through varying methods, including a formal presentation of such evidence to the court in a pleading by a party opposing class certification, or through more informal means, such as the court's own

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[224] This will also help resolve the sub-split identified within the majority circuits. *See supra* note 53. Instead of forcing courts to determine definitively whether "motive X" is indeed a proper or improper purpose in all cases, it allows the courts to consider mixed motives, and even allows them to pass judicial muster, so long as the questionably improper motive does not so overshadow the motive of resolving the claim that typicality and adequate representation are rendered null. *Compare* Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 808-09 (5th Cir. 2002) (finding economic embarrassment and harm to be improper motives that outweighed the legitimate motives of pursuing the claim's final resolution), *with* Sussman v. Bank of Isr., 56 F.3d 450, at 459 (2d Cir. 1995) (finding that economic embarrassment is not necessarily an improper motive). Adopting the proposed judicial reasoning would allow the court, in a class certification determination, to focus its attention on whether the pursuit of economic embarrassment of a defendant so outweighs the pursuit of resolution to the identified claim, rather than forcing the court to wrestle with whether and how to definitively categorize the particular questionable motive itself (improper versus proper in all cases).

[225] *See, e.g.,* Mazurczak, *supra* note 16, at 106 (asserting that personal or economic harassment, even where papers are filed non-frivolously, may be improper motives); Re, *supra* note 61, at 107 (describing cases pursued and presented for "vexation value" as being improperly motivated); *supra* note 26 (noting that Rule 11 specifically identifies delay, harassment, and unnecessary increase in litigation costs as a non-exclusive list of improper purposes).

[226] An analysis of the integrated Rule 11 and Rule 23(a) inquiry applied subjectively to the case at hand is necessary, so as to avoid the current problems of some circuits applying Rule 11 completely objectively, while still being required to apply Rule 23(a) subjectively. *See, e.g., supra* notes 25, 43-44 and accompanying text (detailing examples of courts interpreting Rule 11 as either not having, or not requiring, any subjective inquiry).

weighing of various facts before it. The choice of litigation tactics may provide such evidence: for instance, in the *WSB Electric Company* case, the court supported its finding of improper motives largely on the plaintiffs' choice of litigation tactics.[227] The court reasoned that the plaintiffs would have filed for injunctive relief if indeed they were seeking resolution of their asserted claim.[228] Instead, the plaintiffs pursued what the court termed "complex and burdensome litigation," thereby amplifying the improper motive of pursuing economic or political objectives.[229]

Additionally, the out-of-court methods employed by the litigants or counsel may demonstrate improper motives. For example, in the *Whitehead* case, the Fifth Circuit identified no problems with the litigant's or attorney's choice of litigation tactics, but concluded that the attorney's extrajudicial interaction with the media evidenced an improper motive.[230] Because courts already use an attorney's background and experience in class action litigation as a factor in determining whether to appoint them as class counsel under Rule 23(g), the courts could also use information regarding the attorney's prior litigation outcomes to evaluate potential improper motive concerns.[231] For instance, if a court noted that an attorney had led several prior class action suits to settlement from which he benefited greatly—and disproportionately—to the benefit received by his client class members, that may be a "red flag" indicating that close scrutiny is required by the court in order to determine whether the suit is brought for resolution of the legal claim, or for further disproportionate monetary or publicity gain for the attorney.[232] The court could also consider for this inquiry the method by which plaintiff class members were acquired: an attorney's aggressive pursuit of class members to bolster a claim may indicate a motive of personal gain for the attorney outweighing the motive of claim

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227 WSB Elec. Co. v. Rank & File, 103 F.R.D. 417, 421 (N.D. Cal. 1984).

228 *Id*. at 420.

229 *Id*. at 421; *see generally supra* note 44.

230 *See supra* text accompanying notes 49 and 53.

231 *See supra* note 123 (providing the full text of Rule 23(g) and noting that part of the court's inquiry toward the putative class counsel must be whether that attorney is capable of competently prosecuting the suit, allowing an examination of counsel's prior litigation experience).

232 *See, e.g., supra* notes 124-26 and accompanying text (examining the dangers to the class members' interests engendered by allowing an improperly motivated attorney to act as class counsel); *supra* note 135 (offering examples of actual situations in which class counsel's gains and benefits far outweighed and were disproportionate to the recoveries gained by each class member).

resolution, as opposed to an attorney's aggressive pursuit of resolving a claim for the class members, which would likely indicate the opposite.[233]

C. The When: When Improper Motive Evidence Should Be Considered

Because this Model Judicial Reasoning approaches Rule 11 improper motive inquiries relative to and in conjunction with Rule 23(a)'s class certification requirements of typicality and adequate representation, the most logical point in a claim's timeline to conduct the inquiry would be when the court conducts the required class certification inquiries and determinations.[234] This timing is not only the most logical, but is likely to be the most efficient as well. As previously noted, several factors a court should consider regarding the improper motive inquiry align with elements of determinations the court is already required to make at the time a class seeks certification and a class counsel seeks appointment.[235] Thus, rather than expanding the process to involve some separate and independent inquiry step, this approach would have the court consider the Rule 11 improper motive inquiry at the same "early practicable" time it examines typicality and adequate representation for class certification.[236]

V. CONCLUSION: FORGING AHEAD WITH ROADMAP IN HAND

Class actions will continue to be a powerful presence in the landscape of American litigation, and careful consideration of the purposes underlying the pursuit of the action will be necessary to ensure the protection of absent class members' rights as intended by Rule 23(a). This Note proposes an approach to examining the motives of the putative class representative(s) and class counsel to better address the

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[233] *See, e.g.*, Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 554 (S.D.N.Y. 1972) (expressing concern and wariness of those small claims that inspire attorneys to solicit plaintiffs in order to pursue a lawsuit through which the attorney stands to gain significant fees, but the class members stand to gain very little); *supra* note 75 (noting several instances where media coverage of certain products seemed to instigate class action litigation, rather than widespread injury and lawsuits instigating media coverage).

[234] As of the 2003 amendments to Rule 23, a court is required to determine whether or not to certify a class at "an early practicable time." FED. R. CIV. P. 23(c)(1)(A). Prior versions of Rule 23 required a certification decision "as soon as practicable after commencement of an action," but the 2003 amendments revised the time requirement to better reflect the fact that class certification determinations may require a significant amount of gathering and presenting information, termed "certification discovery" by the Advisory Committee. FED. R. CIV. P. 23(c) advisory committee's note.

[235] Regarding class certification requirements, see *supra* note 78. Regarding class counsel appointment, see *supra* note 123.

[236] *See supra* note 234.

threat of predatory litigation via class actions, and to better align with Rule 23(a)'s typicality and adequate representation protections, without chilling parties' ability to seek class treatment for their claims.

The proposed approach would protect the issue-focused plaintiffs in the hypothetical situation developed above. Using the proposed reasoning, the court would deny certification to the class led by motive-focused plaintiffs, because the ulterior motives outweighed the pursuit of claim resolution, rendering the motive-focused plaintiffs neither properly "typical" of the issue-focused plaintiffs, nor adequate representatives for them. By denying certification to the class led by motive-focused plaintiffs or attorneys, the court would ensure that the issue-focused plaintiffs' rights are preserved, and that they are not, under the *Hansberry* analysis, unconstitutionally bound to any settlement or judicial decision reached in the matter. Thus, use of the proposed Model Judicial Reasoning provides a uniform structure and approach that will minimize the uncertainty and unfairness currently plaguing the federal courts faced with class action litigations, while strengthening the protections guaranteed to absent class members under Rule 23.

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[*] J.D., Valparaiso University School of Law, 2006; B.A., Criminal Justice and Religious Studies, Indiana University-Bloomington, 2000. This Note is dedicated to my grandfather, Loyal Humbracht, for keeping me supplied with comics and Chex Mix—a proven brain power cocktail—throughout the notewriting process; to my grandmother, Larraine Humbracht, whose "Foam of Knowledge" helped make this and a multitude of other successes possible; to my mother, Sally Bracke, who taught by example that persevering is possible in the face of intimidating obstacles with a little faith and a lot of humor; and to my father, Stephen Bracke, whose "Can Do!" attitude, amusingly modified Photos of the Day, and frequent trips to lend a hand to a handiwork-challenged daughter made more difference than he probably realizes.